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EDITOR'S NOTE

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y 13, 1985

Title: Ronald A. Schiavone, Genaro Licueri and Joseph A. DiCarolis, Petitioner
v.
Fortune, aka Time, Incorporated

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Schnitzer,Morris M.

Counsel for respondent: Banta,Peter G.

ıtry	Date	Note	Proceedings and Orders
1	May 13 1985	G	Petition for writ of certiorari filed.
2	Jun 3 1985		Supplemental brief of petitioners Ronald Schiavone, et al. filed.
3	Jun 14 1985		Brief of respondent Fortune, aka Time, Inc. in opposition filed.
4	Jun 18 1985		DISTRIBUTED. September 30, 1985
5	Jul 12 1985	X	Reply brief of petitioners Ronald Schiavone, et al. filed.
6	Oct 7 1985		Petition GRANTED.
			**********
9	Nov 23 1985		Brief of petitioners Ronald Schiavone, et al. filed.
10	Nov 27 1985		Joint appendix filed.
11	Dec 11 1985		Record filed.
12	Jan 3 1986		Brief of respondent Fortune, aka Time, Inc. filed.
13	Jan 7 1986		SET FOR ARGUMENT, Wednesday, February 26, 1986. (1st case)
14	Jan 13 1986		CIRCULATED.
15	Jan 31 1986	X	Reply brief of petitioners Ronald Schiavone, et al. filed.
16	Feb 26 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

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84-1839
NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RONALD A. SCHIAVONE, GENARO LIQUORI and JOSEPH A. DiCAROLIS,

Petitioners,

vs.

FORTUNE, also known as TIME, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Should *certiorari* be granted to resolve an even division between six Federal Circuits over the correct application of F. R. Civ. P. 15(c)?

2. Should the Supreme Court exercise its supervisory power to grant *certiorari* to address the following questions and thereby to resolve a conflict between the Courts of Appeal?

A. Where Petitioners originally sued "Fortune", which was not a legal entity, and later amended to name "Fortune, also known as Time, Incorporated" as the party defendant, was there a "change of parties" within the meaning of F. R. Civ. P. 15(c)?

B. Petitioner filed suit naming Fortune as the defendant on May 9, 1983. Actual process was delivered to Time, Incorporated on May 23, 1983. The one year statute of limitations runs from date of publication, May 19, 1982. Where Time, Incorporated received notice of the institution of the action against Fortune within the time allowed for service of process after filing the Complaints, did Petitioners give Time, Inc. "within the period provided by law for commencing the action against him" "such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits", in the sense of F. R. Civ. P. 15(c)?

Statement Pursuant to Supreme Court Rules 21 and 28.1

The following parties may have an interest in the outcome of this proceeding:

TIME INCORPORATED

The above party has been served with a copy of this Petition.

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NO.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinion Below

This Petition for a writ of *certiorari* seeks review by this Court of the judgment of the United States Court of Appeals for the Third Circuit entered on December 10, 1984 based on an Opinion reported at 750 F.2d 15 (3rd Cir. 1984). (Appendix A). An application of the Petitioners for a rehearing *en banc* was denied by Order dated February 13, 1985. (Appendix C).

Jurisdiction

The Order of the Third Circuit Court of Appeals to which this petition is addressed was entered on February 13, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Federal Rules Involved

F. R. Civ. P. 15(c) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity

> of the proper party, the action would have been brought against him.
>
> The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satifies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Statement of the Case

The facts presented on Respondent's Fed. R. Civ. P. 12(b)(6) motion were undisputed. Petitioners alleged that they were libelled in a cover story entitled "The Charges Against Reagan's Labor Secretary" which appeared in the May 31, 1982 issue of Fortune magazine. Complaints against "Fortune" were filed by the Petitioners on May 9, 1983. Substantial distribution of that issue of Fortune was held to have occurred on May 19, 1982. The New Jersey statute of limitations for libel (one year) expired on May 19, 1983.

On May 20, 1983, Petitioners served "Fortune" by mailing the complaints to the New Jersey registered agent for Time, Inc. Fortune is a trademark and an internal division of Time, Inc., but has no other separate legal identity. Time, Inc. received the complaints on May 23, 1983 but refused to accept service because the party named was not spelled "Time, Inc."

On July 19, 1983, Petitioner amended the complaints to name the defendant as "Fortune, also known as Time, Incorporated." The amended complaints were served by

certified mail on July 21, 1983. The District Court granted Time's motion to dismiss, based upon the statute of limitations defense, and held that the amended complaints did not relate back to the original filing date because Time had received notice of the institution of the action after May 19, 1983.

In is Opinion affirming the dismisal, the Third Circuit held:

> (a) under Fed. R. Civ. P. 15(c), regarding when an amended complaint shall relate back to the original filing date, notice of the institution of the action must actually be received by the defendant within the calendar period of the applicable statute of limitations. The Court rejected the principle, established by the Second Circuit in *Ingram* v. *Kumar,* 585 F.2d 566 (1978), *cert. den.,* 440 U.S. 940 (1979), that notice "within the period provided by law for commencing the action" includes the time penumbra after filing of the complaint, permitted for service of process; and
>
> (b) that no exception to the Court's reading of rule 15(c) should be created where there is an identity of interest between the intended defendant and the defendant named in the complaint.

Reasons for Granting the Writ

There is a classic conflict of decisions among the Circuits. The Second, Fifth and Sixth Circuits follow the reasoning and principle of *Ingram* and the Seventh, Ninth and Tenth Circuits, along with the Third Circuit in this tie-breaking decision, reject *Ingram* as deviant from the letter of F. R. Civ. P. 15(c). This conflict should be resolved so that a single version of the Rule prevails in the United States and so that the authentic reading given to the Rule allows the merits to prevail without procedural frustration.

ARGUMENT

I

The supervisory power of this Court is needed to resolve a conflict among the Courts of Appeal as to whether F. R. Civ. P. 15(c) precludes "relation back" beyond the calendar limitations period under all circumstances.

The question presented in these consolidated cases was *res nova* in the Third Circuit. There exists a sharp disagreement among other Circuits on the issue. That dichotomy is best exemplified by contrasting the Second Circuit's view in *Ingram* with that of the Seventh Circuit beginning with *Simmons* v. *Fenton,* 480 F.2d 133 (7th Cir. 1973) to *Hughes* v. *United States,* 701 F.2d 56 (7th Cir. 1982). In *Ingram,* the plaintiff brought a medical malpractice action naming Vijaya N. Kumar, a physician, while intending to sue Vijay S. Kumar, actually another doctor. The complaint was filed on December 28, 1976 against Vijaya N. Kumar. While attempting to serve the defendant, Ingram's counsel learned of the error. The correct defendant was served with a copy of the complaint (without any amendment) on May 6, 1977, "several months after the statute of limitations had run," 585 F.2d at 571.

The Second Circuit observed that a literal reading of 15(c) would require notice before the calendar limitations period expired. Such a construction, however, was held to be

> . . . unjustified in jurisdictions where timely service of process can be effected after the statute of limitations has run. In those jurisdictions, even an accurately named defendant may not receive actual notice of the action against him prior to the running of the statute of limitations yet there is no doubt that the action against him is timely commenced. There is no reason why a misnamed defendant is entitled to earlier notice that he would have received had the complaint named him correctly. (footnote omitted).

585 F.2d at 571.

The court was then faced with addressing the point where, in a diversity case, state substantive law terminated and federal procedure took over, in determining whether service of process was timely. It concluded that the federal procedure governed, but under a philosophy which preferred the reason of the Rule over its letter:

> We hold that under Rule 15(c) the period within which 'the party brought in' must receive notice of the action includes the reasonable time allowed under the federal rules for service of process.

585 F.2d at 571-572.

By contrast, in *Stewart* v. *United States,* 655 F.2d 741 (7th Cir. 1981), the plaintiff brought an action under the Federal Tort Claims Act against the Postal Service and its truck driver, whereas the United States should have been the named defendant. An amendment adding the United States as a defendant was filed beyond the six month limitation peirod. The court refused to construe rule 15(c) to permit a "reasonable time" for service of process as being within the parameters of the notice requirement.

The lines are drawn between those Circuits which agree that *Ingram* presents the better view because it adheres to the "merits" oriented philosophy of the Federal Rules and achieves the intended and desirable results [*Ringrose* v. *Engelberg Huller Co., Inc.,* 692 F.2d 402 (6th Cir. 1982); *Kirk* v. *Cronvich,* 629 F.2d 404 (5th Cir. 1980); *Ratcliffe* v. *Ins. Co. of N. America,* 482 F. Supp. 759 (E.D. Pa. 1980); *United States for use and benefit of Arrow Electric* v. *G.H. Coffey,* 100 F.R.D. 413 (D. Maine 1983); *Clark* v. *Southern Railway Co.,* 84 F.R.D. 356 (N. D. Ill. 1980)] and those which, like the Court below, express disturbance with the "harsh" results produced by a "literal" reading of Rule 15(c) [*Schiavone* v. *Fortune, supra,* 750 F.2d at 18; *Cooper* v. *U.S. Postal Service,* 740 F.2d 714, 717 (9th Cir. 1984); *Archuleta* v. *Duffy's Inc.,* 471 F.2d 33 (10th Cir. 1973)], but are reconciled to a procedural frustration of the merits by the observation that the words of the Rule are too plain to allow an equitable outcome.

The guiding hand of this Court is imperative to give primacy to the principle that the Rules were made to deliver justice on the merits and are not themselves the ends of justice.

Perhaps the most convincing statement why Petitioners' amendment should relate back is found in Circuit Judge Jones' concurrence in *Ringrose* v. *Engelberg Huller Co., supra.*

> I beieve that the better view considers as timely notice to parties actually named in the complaint. Original parties quite obviously do not receive notice of the filing of a lawsuit by the filing of the complaint. The rules reject the concept of notice by filing in favor of requiring an additional mechanism reasonably calculated to give notice. See Fed. R. Civ. P. 4. The restrictive view of *Simmons*

> v. *Fenton, supra,* and *Archuleta* v. *Duffy's, supra,* could at times require notice by the party to be added before the party named in the complaint receives notice. See *Ingram* v. *Kumar, supra* at 571. There is no reason to require more expeditious notice to an added party than it would have had if it had been correctly named. Avoidance of this anomalous result may itself be an adequate reason to reject the interpretation which brings it about.

692 F.2d at 410. (Jones, C.J., concurring).

The view of Judge Jones not only promotes the policy of sufficient notice to intended but misnamed defendants but also protects against the assertion of stale claims and thus reinforces the salutary basis for limitations statutes. Judge Jones' logic is unassailable.

> If a claim is not stale as to the party originally named, no policy associated with the statute of limitations justifies foreclosing the addition of a party when notice is received within the period providing by the law of statutes of limitations and tolling doctrines. *Ibid.*

The issue in all of these cases is "notice" under Rule 15(c), not timely commencement of an action. "Notice" is uniquely tied to service of process, not filing of a complaint, though in some jurisdictions, like New York and Oklahoma a statute of limitations is not tolled until a summons is issued. Rule 15 continues to maintain the vital prerequisites that the claim must arise out of the same transaction or occurrence as the original claim, the action must be timely commenced and the actually intended defendant must know or should have known that, but for a mistake in identification, the action would have been brought against him. It is unlikely that a defendant who

receives notice of an action within the time allowed for service of process upon the original defendant can demonstrate prejudice in maintaining a defense on the merits which would not have occurred from an unquestionably timely notice. Nor should a defendant be entitled to prevail from the windfall of a plaintiff's error, so promptly corrected.

> The Federal Rules reject the approach that pleading is the game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Conley v. *Gibson,* 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed. 2d 80 (1957). In *Conley,* Justice Black cited to in his opinion in *Maty* v. *Grasselli Chemical Co.,* 303 U.S. 197 (1938), where the court permitted the amendment of a complaint to relate back because the New Jersey statute of limitations, as applied by the New Jersey state courts, would permit it.

This Court's decision below, though aligned with the *strictissismi juris* construction of the Seventh Circuit, expresses an impotency to adopt the *Ingram* rule. While the *Ingram* holding was so "persuasive" as "a policy matter" to invoke the Court's sympathy, adherence to it required an amendment to the "clear and unequivocal" language of Rule 15(c), wrote the Court. 750 F.2d at 18.

No such apprehension is found in Circuit Judge Feinberg's *Ingram* opinion. Relying on Professor (later Justice) Benjamin Kaplan's implied criticism of the Seventh Circuit cases, the Second Circuit found that liberal application of the notice requirement was "permissible and desirable and carries out the beneficient purpose of the 1966 amendment." 585 F.2d at 572.

The argument to this point assumes that an amendment, replacing Fortune with Time, was essential to allow the case to proceed on the merits against Time. The trial judge granted the motion of Time to dismiss the case, nominally against Fortune, because it had not been brought against Time, *eo nomine,* before the statute had expired. This was the basis for its decision to dismiss the action once it had denied the amendment which would have replaced Fortune with Time. However, there is no principle of jurisprudence which makes it illicit to identify a defendant, by a nickname or a misspelling, just as securely and effectively as if the correct name were used. Whatever the goals of procedural rules may be legitimately, they cannot be fairly construed to make justice on the merits turn upon whether the formal name, correctly spelled, was used by a defendant or whether some variant, unerringly recognized both by the defendant and the world, was employed to designate the defendant.

The Court of Appeals, in its Opinion, never noticed this feature of the case and did not discuss or decide it. The trial judge met the issue halfway when he described the plaintiffs' circumstances as a predicament of misnomer and then quoted the oft-cited Committee Comment to the effect that misnomer belongs with replacement or substitution of defendants, correctable only under 15(c) and by the same standards. Advisory Committee's Note, Fed. R. Civ. P. 15(c), 39 F.R.D. 82 (1966).

"Misnomer", however, in the sense of the Committee's use of that term, and the generally accepted understanding, is a confusion between two existing, living persons or entities, where the plaintiff names one while intending the other. See, *e.g., Patrick* v. *Brago,* 4 N.J. Super. 226 (App. Div. 1949).

There is no misnomer in addressing Time by one of its monikers, *i.e.,* Fortune, because neither Time, a court or

the rest of mankind can have a moments illusion or doubt about identity. There can be no "misnomer" where any possible confusion of identity is barred by a history in which the defendant sued has identified itself, at great expense, over a long period of time, by the moniker which it has held out to the world.

There may be an interest in reading juridical procedural rules literally, even at the cost of suppression of the merits, where regularity and uniformity throughout a national court system may require such a balance to be struck. However, there is no conceivable interest of justice in confining litigation to the correct spelling of the formal corporate names of defendant in a setting where identification is perfect, unmistakeable, free from all doubt and instantly recognized both by the defendant and the world. The failure of justice on the merits in such a case is not adherence to the plain language of a plain rule, but rather the total frustration of its purpose by an overliteral and overnarrow reading of words which, when divorced from their purpose, are as empty of meaning as objects on a barren landscape.

II

Even a "literal" reading of Rule 15(c) mandates relation back of amendments where the intended defendant has an identity-of-interest with the named defendant.

Cases where there exists both an "identity-of-interest" and notice within the time allowed for serving of a complaint after filing are particularly appropriate for a reading of Rule 15(c) in tune with the liberal intention of the book of Rules to yield justice on the merits. Prior to the 1966 amendments, the first sentence on Rule 15(c) (which was not charged) was often employed to find "relation back" where the parties were closely associated in their business activities or jural relation, so that institution of an action one was bound to give notice to the other. *Shapiro* v. *Paramount Film Distributing Corp.*, 274 F.2d 743, 746 (3rd Cir. 1960).

Notice of an action before the time limits for filing of the Complaint may be an appropriate concern for a truly "new" defendant. Rule 15(c) should be read, however, to include such a party if notified or served within the time allowed for service of the originally named defendant where both parties have an identity-of-interest. See 6 Wright & Miller, *Federal Practice & Procedure*, §1499, at 517-518 and 522 (1971); *Note: Federal Rule of Civil Procedure 15(c): Relation Back of Amendments*, 57 *Minn. L. Rev.* 83, 102, 71 (1972), where the author advocates a vicarious notice approach to Rule 15(c).

> Stated another way, an identity of interest indicates that a [new] party will have fair notice of the action and an opportunity to prepare its case, as well as reason to know of plaintiff's mistake in suing the wrong business. If the business activities are so closely related so as to assure such notice, it is almost certain that Rule 15(c)(1) is satisfied. (Bracket added)

The majority of cases adopting an "identity-of-interest" exception to Rule 15 present corporate relationships and transactions reflecting common ownership and operations. Thus, the common denominator is found in parent-wholly owned subsidiary (*Travelers Indem. Co.* v. *United States ex. rel. Construction Specialties Co.*, 382 F.2d 103 (10th Cir. 1967)), affiliated corporations (*Bernstein* v. *Uris Builders Corp.*, 50 F.R.D. 121 (S.D.N.Y. 1970)) and merged or dissolved and successor corporation settings (*Wentz* v. *Alberto Culver Company*, 294 F. Supp. 1327 (D. Mont. 1969)).

Petitioners argued below that a corporate "division" is an *a fortiori* example of identity of interest, since it has no legal capacity to be sued but was staffed, owned, operated and had the same principal office as the parent entity, unquestionably satisfying the identity-of-interest test under Rule 15(c). *Montalvo* v. *Tower Life Building*, 426 F.2d 1135 (5th Cir. 1970); *Pitman* v. *Anaconda Wire and Cable Company*, 408 F. Supp. 286 (E.D. No. Car. 1976).

While the Third Circuit refused to recognize this exception (750 F.2d at 17-18), at least one other Circuit (the Ninth) which also follows the Seventh Circuit view has permitted substitution "when notice of the action's institution was given to another entity with which there was a 'sufficient community of interest.'" *Cooper* v. *U.S. Postal Service, supra*, 740 F.2d at 717; See *Korn* v. *Royal Carribbean Cruise Line, Inc.*, 724 F.2d 1397, 1400-01 (9th Cir. 1984).

There are, in truth, two types of misnomers. In one, there are two real and distinct but related persons or entities and the plaintiff simply names one, while intending the other, and serves the intended defendant. Thus, in *Martz* v. *Miller Bros. Co.,* 244 F. Supp. 246 (D. Del. 1965), the original complaint was filed timely, but served three days after the statute ran. The intended defendant, an affiliated firm named "Miller Bros. Co. of Newark", was sought to be substituted. In denying the request, the District of Delaware conceived itself to be a prisoner of an overliteral reading of 15(c), as did the District Judge below. Recognizing the consequent anomaly, the court commented that under a strict reading, correction of misnomers would fail under circumstances entailing no possible prejudice to the new defendant, with the consequent frustration of the object of the amendment, and suggested a rule change to make the correct reading more evident and more obligatory. 244 F. Supp. at 254, n.21; See also *Wright & Miller, supra,* §1499 at 521.

In the other type, the fact of "misnomer" is beyond cavil. As Judge Feinberg stated in *Ingram, supra,* "the amendment should clearly be allowed under Rule 15(c)" where the error is so obvious or miniscule that it is agreed the *intended* defendant was named and served. 585 F.2d at 570.

> In most "misnomer" cases, however, "the party to be brought in" by the amendment already knows before the amendment about plaintiff's claim and that plaintiff actually intended to assert it against him. For example, the plaintiff names a corporation in the complaint instead of a partnership and serves a partner, or incorrectly spells, in a minor detail, the name of a defendant who is served.

858 F.2d at 570.

Accordingly, a distinction should be made between "misnomers" where the original defendant is the intended defendant but is misnamed or misspelled and is served in a timely fashion and "changes of parties," where the original defendant sued is *not* the intended defendant but is a completely different person or entity (and thus no identity-of-interest), and the intended defendant is later sought to be added after the limitations period has expired. See *Ingram, supra.* Whatever merits may be found to support the view that the notice requirement should also extend to the time for service of process under the *Ingram* facts, it cannot be seriously disputed that, if the second sentence of Rule 15(c) is to apply at all, it cannot apply to defeat a claim where the *intended* defendant has been sued and served in a timely manner, whether initially named as a division, trade name, subsidiary, affiliated entity or other alias.

In *Wentz, supra,* the plaintiff sued the Albert-Culver Company, an Illinois corporation. The defendant had, however, dissolved the Illinois corporation, and transferred its assets to a Delaware corporation of the same name. Although the complaint was filed timely on January 31, 1966, service of process (and thus notice) did not reach the correct corporation until the statute of limitations had run. The District Court ruled that such a misnomer was governed by the pre-1966 amendment decisional authority interpreting the first sentence of Rule 15(c) and thus it permitted the relation back. *Wentz* has been praised for allowing "a correction in form rather than substance"[1] and chastised for ignoring the Advisory Committee's Note making "misnomers" includible under the amendment. *Id.*

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[1] Note, *supra,* 57 *Minn. L. Rev.* at 111.

at 111-112; *Wright & Miller, supra,* §1499 at 521. Professors Wright and Miller suggest that when a court is faced with the very circumstances that leads to the anomaly exemplified by and lamented in *Martz, supra,* the court should examine the facts to determine if the notice policy underlying 15(c) is satisfied:

> Of course, the Wentz court was faced with a dilemma and the actual result it reached was desirable. But since Rule 15(c) is based on a notice policy, the court probably should have relied upon the inherent flexibility of the rule. The facts certainly were appealing enough. The new defendant was well aware of the claim within the statutory period. Indeed, it had sent an experienced investigator to discuss the problem with plaintiff and had proposed a possible settlement of the dispute even before the action was commenced. Furthermore, although two corporations were involved, there clearly was an identity of interest between the dissolved Illinois corporation and the Delaware corporation so that commencement against one and service on the agents of the other could have been deemed proper commencement against the successor.

Id. at 522.

Petitioners in the present action each sent a letter to Fortune dated April 13, 1983 advising Respondent that they had been libelled in the May 31, 1982 article, requesting a retraction and imposing a deadline of May 1, 1983 for a response. Respondent sent a letter from "house counsel" on April 28, 1983 denying the request. Thus Respondent was fully aware within the one year period that litigation might ensue. Moreover, the facts reveal that Fortune is a "registered mark" and "internal division" of

Time, Inc.; its "president, Treasurer and Secretary" are those of Time, Inc. and it maintains its principal office at the Time and Life Building, in New York City. It is difficult to imagine a closer identity of interest case. Finally, service was accomplished on Time Inc.'s registered agent in New Jersey fourteen days after the filing of the Complaint and four days after the date of "substantial distribution" of a mazagine dated May 31, 1982.

It is an old teaching that the letter killeth where the spirit can fulfill.

The modern goal of all procedure, most explicitly the Federal Civil Rules, is to see justice done on the merits. Fed. R. Civ. P. 1. Any outcome which sees the merits jettisoned so that a Rule can be fulfilled according to its letter is presumptively a misreading of the Rule. In the instant case, the acquittal of Time of serious charges never addressed on the merits, given that Time was named by one of its widely advertised and promoted monikers, makes the presumption of miscarriage conclusive. This ought not to be allowed by a decision, which would conform the law of the United States to that of three Federal Circuits, slanted in a direction which is regressive, in defeating the paramount and universally professed interest in accomplishing justice on the merits.

CONCLUSION

For the reasons stated above, this Petition for a Writ of *Certiorari* should be granted.

Dated: May 10, 1985

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 84-5029/30/31

SCHIAVONE, RONALD A.,
Appellant

v.

FORTUNE
also known as TIME, INCORPORATED,
Appellee

LIQUORI, GENARO,
Appellant

v.

FORTUNE
also known as TIME, INCORPORATED,
Appellee

[1a]

Appendix A

DiCAROLIS, JOSEPH A.,

Appellant

v.

FORTUNE
also known as TIME, INCORPORATED,

Appellee

On Appeal for the United States District Court for the District of New Jersey

(D. C. Civil Nos. 83-1654/5/6)

Argued: September 11, 1984

Before: Seitz, Becker and Rosenn, *Circuit Judges.*

(Opinion Filed: December 10, 1984)

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Appendix A

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OPINION OF THE COURT

Seitz, *Circuit Judge.*

This is an appeal from three orders of the district court dismissing plaintiffs' complaints for libel. Subject matter jurisdiction in the district court existed pursuant to 28 U.S.C. § 1332. This court has appellate jurisdiction under 28 U.S.C. § 1291.

I.

An article which allegedly libeled plaintiffs appeared in the May 31, 1982 issue of Fortune Magazine. A substantial distribution of that issue occurred on May 19, 1982, at the latest. The New Jersey statute of limitations for libel is one year, running from the date of substantial distribution. *See* N.J. Stat. Ann. § 2A:14-3. The statute ran in this case, therefore, on May 19, 1983, at the latest. Plaintiffs filed complaints on May 9, 1983. Those complaints named "Fortune" as the sole defendant.

On May 20, 1983, plaintiffs mailed the complaints to the New Jersey registered agent for Time, Inc. ("Time"). Fortune is a trademark and an internal division of Time. The complaints were received on May 23, 1983, and Time refused to accept service because it was not named as a

party. Plaintiffs do not urge that Fortune is a separate legal entity with the capacity to be sued.

On July 19, 1983, plaintiffs amended their complaints to name as defendant "Fortune, also known as Time, Incorporated," rather than simply "Fortune." The amended complaints were served by certified mail on July 21, 1983. Time then moved to dismiss plaintiffs' complaints. The district court granted defendants' motion on statute of limitations grounds, holding that the amended complaints did not relate back to the original filing date. Subsequently, a timely motion for reconsideration was denied.

II.

The district court applied Fed. R. Civ. P. 15(c) to determine whether the amended complaint would relate back to the original filing date. Rule 15(c) in pertinent part provides:

> An amendment changing the party against whom a claim is asserted relates back if . . . within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The district court concluded that, since Time did not have notice of the institution of the actions until May 23, 1983, which was after the statute of limitations had run,

the amenment could not relate back under rule 15(c). Thus, the court held that plaintiffs' actions were time barred.

III.

Plaintiffs argue that the district court committed legal error in three separate respects. First, they argue that their amendment did not change a party within the meaning of rule 15(c) because there should be an "'identity of interest' exception to rule 15." Second, they argue that, even assuming their amendment did change a party, under a proper reading of the rule the requirements for relation back have been satisfied. Third, they argue that under *Erie* and its progeny the district court should have permitted relation back in accordance with New Jersey law.

A. *An "Identity of Interest Exception"*

Plaintiffs argue that if the original defendant is "misnamed or misspelled," and there is an identity of interest between the intended defendant and the defendant named in the original complaint, an amendment correcting the misnomer should not be considered a change of party for rule 15(c) purposes. We note at the outset that this case does not concern the misspelling of a defendant's name and we express no opinion as to the reasoning that would apply in such a case.

We assume, without deciding, that plaintiffs' properly characterize the naming of the defendant in the original complaint as a "misnomer". The advisory committee note to rule 15(c) explains that an amendment to "correct a misnomer or misdescription of a defendant" changes a

party within the meaning of the rule. This, as a general matter, would seem to be dispositive of plaintiffs' argument.

Still, plaintiffs argue that the advisory committee note does not contemplate misnomer cases in which there is an identity of interest between the original defendant and the intended defendant. Plaintiffs note that they proffered service of the original complaint to Time in a timely fashion, and that Time received notice of the institution of the action at the same instant it would have had it been properly named in the original complaint. Thus, they conclude, Time should not be entitled to earlier notice than it would have received had it been properly named, because it has an identity of interest with the defendant named in the original complaint.

There is no support in the rule or the advisory committee note for plaintiffs' proffered exception. At bottom, it rests on the argument that, since the intended defendant received notice of the action within the time allowed for service of process, it was not prejudiced by plaintiffs' mistake and, therefore, the amendment should relate back. We will address that argument next, but its persuasiveness does not turn on whether an identity of interest exists between the original and intended defendant. We hold, therefore, that the district court did not err in refusing to adopt an "identity of interest exception" to rule 15(c).

B. *Rule 15(c) Notice*

Rule 15(c) provides that an amendment bringing in a defendant relates back if notice "of the institution of the action" was received by the defendant "within the period provided by law for commencing the action. . . ." The

advisory committee note explains that "the period provided by law for commencing the action" is "the applicable limitations period. . . ."

Plaintiffs' position is that they have satisfied the rule. First, they contend that the rule, properly construed, would permit relation back if, within the statutory period, defendant had notice that litigation might ensue. The clear language of the rule refutes this contention. We hold that rule 15(c) requires notice of the actual "institution of the action," and not mere notice that an action "might ensue."

Plaintiffs alternatively contend that the period within which defendant must have notice of the institution of the action is the statutory period, plus the time permitted for service of process. They argue that the defendant was not prejudiced since, at the moment it would have received notice had it properly been named in the original complaint, it received the same notice and knew that, but for a pleading error, it would have been the defendant.

Plaintiffs' argument, as a matter of policy matter, is quite persuasive. It has been adopted as the rule in the second circuit. *Ingram* v. *Kumar,* 585 F.2d 566 (2d Cir. 1978), *cert. denied,* 440 U.S. 940 (1979). But *see Hughes* v. *United States,* 701 F.2d 56 (7th Cir. 1982).

Defendants respond that the language of the rule is clear and unequivocal, requiring notice within the period "for commencing the action" and not the period "for commencing the action plus the time permitted for service of process." They argue that, since the filing of the complaint arguably provides the named defendant with constructive notice when the action is instituted, the rule is sensible as drafted. Moreover, they argue that it is not proper for

a court to amend a rule of procedure whenever it would have drafted a different one.

We read the language of rule 15(c) to be clear and unequivocal, requiring that notice to the defendant occur within the statutory period. While we are sympathetic to plaintiffs' arguments, we agree with the defendant that it is not this court's role to amend procedural rules in accordance with our own policy preferences. We hold, therefore, that the period within which defendant must receive notice under rule 15(c) does not include the time provided for service of process.

C. *The Erie Question*

Plaintiffs contend that rule 15(c), if interpreted so as to deny relation back in this case, is at odds with the New Jersey rule. They further argue that the relation back rule is substantive and that under *Erie R.R. Co.* v. *Tompkins*, 309 U.S. 64 (1938) and *Walker* v. *Armco Steel Corp.*, 446 U.S. 740 (1980), the district court is bound to apply the New Jersey rule.

We need not address this argument on the merits. Plaintiffs do not deny that they conceded in the district court that the New Jersey rule was procedural only, and that the district court, in deciding the case, relied on that concession. Although plaintiffs concession, of course, is irrelevant to the proper interpretation of New Jersey law, it is dispositive of plaintiffs argument on appeal. We hold that the district court's reliance on plaintiffs' concession in deciding this case does not constitute reversible error.

IV.

During the pendency of this appeal, plaintiffs moved for a limited remand to permit the district court to rule on their motion for "clarification" of the district court's order of December 8, 1983. The merits of the clarification issue are unrelated to the issues presented on appeal and concomitantly they are not within the scope of this court's mandate. No remand will be necessary, therefore, in order for the district court to entertain and decide such a motion subsequent to our decision. *See Standard Oil of California* v. *United States*, 429 U.S. 17 (1976). Plaintiffs' motion will be dismissed as moot.

The orders of the district court will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 84-5029/30/31

SCHIAVONE, RONALD A.,

Appellant in No. 84-5029

v.

FORTUNE
also known as TIME, INCORPORATED,

Appellee

LIQUORI, GENARO,

Appellant in No. 84-5030

v.

FORTUNE
also known as TIME, INCORPORATED,

Appellee

Appendix B

DiCAROLIS, JOSEPH A.,

Appellant in No. 84-5031

v.

FORTUNE
also known as TIME, INCORPORATED,

Appellee

On Appeal for the United States District Court for the District of New Jersey

(D. C. Civil Nos. 83-1654/5/6)

Present: Seitz, Becker and Rosenn, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel September 11, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, entered December 9, 1983 in D. N. J. Civil Nos. 83-1654, 83-1655, and 83-1656, appealed here respectively at 84-5029, 84-5030, and 84-5031 be, and the same are hereby affirmed. It is further ordered and adjudged that the plaintiffs' motion (filed July 9, 1984) for a limited remand

Appendix B

to the said District Court is hereby dismissed as moot. Costs taxed against appellants.

SALLY MRVOS
Clerk

December 10, 1984

Costs taxed in favor of Fortune as follows:

Brief $303.16

Certified as a true copy and issued in lieu of a formal mandate on February 21, 1985.

Test:

M. ELIZABETH FERGUSON
Chief Deputy Clerk,
United States Court of Appeals
for the Third Circuit

APPENDIX C

Order of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 84-5029
No. 84-5030
No. 84-5031

RONALD A. SCHIAVONE,
Appellant

v.

FORTUNE, also known as TIME, INCORPORATED

GENARO LIQUORI,
Appellant

v.

FORTUNE, also known as TIME, INCORPORATED

JOSEPH A. DiCAROLIS,
Appellant

v.

FORTUNE, also known as TIME, INCORPORATED

Appendix C

Civil Nos. 83-1654/5/6—D.N.J.—Newark)

SUR PETITION FOR REHEARING

Present: Aldisert, *Chief Judge*, Seitz, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker and Rosenn, *Circuit Judges*.

The petition for rehearing filed by appellants in the above entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court
SEITZ
Circuit Judge

Dated: February 13, 1985

SUPPLEMENTAL APPENDIX

84-1839
NO.

Office - Supreme Court, U.S.
FILED
JUN 3 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RONALD A. SCHIAVONE, GENARO LIGUORI and JOSEPH A. DiCAROLIS,

Petitioners,

vs.

FORTUNE, also known as TIME, INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

SUPPLEMENTAL APPENDIX

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33pp

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APPENDIX D

Opinion of the United States District Court for the District of New Jersey

(Filed—November 30, 1983)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RONALD A. SCHIAVONE,

Plaintiff,

v.

FORTUNE, also known as TIME, INCORPORATED

Defendant.

Civil Action No. 83-1654

GENARO LIGUORI,

Plaintiff,

v.

FORTUNE, also known as TIME, INCORPORATED

Defendant.

Civil Action No. 83-1655

Appendix D

JOSEPH A. DiCAROLIS,

Plaintiff,

v.

FORTUNE, also known as TIME, INCORPORATED

Defendant.

Civil Action No. 83-1656

Sarokin, *District Judge*

The court has before it three related defamation actions. Plaintiffs Ronald Schiavone, Joseph A. DiCarolis, and Genaro Liguori allege that an article published in Fortune magazine contained defamatory statements. Federal jurisdiction is based on diversity of citizenship.

The allegedly defamatory article appeared in the issue of Fortune dated May 31, 1982. The title of the article, appearing on the magazine's cover is: "The Charges Against Reagan's Labor Secretary." On pages 81, 85 and 86, the article discusses an informant's tale of a bribe given by Schiavone Construction Co. to a union leader at a luncheon. Mr. Schiavone (president of the company), Mr. Liguori and Mr. DiCarolis (vice-presidents) were placed at the luncheon by the informant. The article also reported that the three Schiavone Construction Co. executives had signed affidavits to the effect that no such luncheon occurred.

The original complaints, filed on May 9, 1983, listed Fortune as the sole defendant. They allege that Fortune

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is a foreign corporation having its principal offices at the Time and Life Building. Amended complaints, filed on July 19, 1983 listed as defendant "Fortune, also known as Time, Incorporated." They allege that Fortune was and is a corporation of the state of New York. The three amended complaints challenge the conduct of defendant in investigating the story and publishing the story, and its conduct after publication, including refusal to retract the story. This conduct is alleged to have been "negligent, as well as conscious, wilful, malicious and deliberate . . .", as a result of which, plaintiffs suffered damage to their reputations and mental anguish.

These cases are before the court on the motion of Time, Inc. addressed to all three cases, to dismiss or for summary judgment, or, in the alternative, for a more definite statement.

MOTION FOR SUMMARY JUDGMENT BASED ON THE STATUTE OF LIMITATIONS

Defendant Time Inc. moves to dismiss the complaints for failure of capacity of the named defendant to be sued or for bar of the limitations period. The first ground, lack of capacity, addresses the form in which Time, Inc. is listed in the caption. The amended complaint names as defendant Fortune, also known as Time Incorporated. It appears to be uncontested at this time that Fortune is not a corporation or other legal entity. Fortune is the name of a magazine published by Time, Inc., a registered mark of Time, Inc., and an internal division of Time, Inc. As such, defendant contends that Fortune lacks capacity to be sued. Plaintiffs do not urge that Fortune has capacity to be sued; in fact, the amended complaints were filed to cure the pleading defects of the original complaints.

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Time, Inc. contends that it has not been made a party by these amendments, relying on *Janus* v. *J.M. Barbe Co.*, 57 F.R.D. 539 (N.D. Ohio 1972). In *Janus* the original complaint named "J.M. Barbe, Individually and d/b/a J.M. Barbe Co." The complaint was amended to add J.M. Barbe Co. as a defendant after the court granted a motion to quash the summons. Without commenting on the merits of the *Janus* decision, this court finds that Time, Inc. has been made a party to these actions. The complaints naming "Fortune, also known as Time, Incorporated" include Time Inc. as a defendant sufficiently to satisfy pleading requirements. Time, Inc. has sufficient notice of these suits against it, has been served and is here in court defending. Plaintiff has sufficiently named Time, Inc., a corporate party with capacity to be sued. If there is any fault with the captions of these cases, it is with the words , "Fortune, also known as", rather than with "Time, Inc." The complaints shall not be dismissed for failure of capacity of defendant to be sued.

Time, Inc. contends that if it has been made a party to these suits, the actions are barred by the expiration of the limitations period on defamation actions. Under New Jersey law libel actions must be commenced within one year of the publication of the alleged libel. N.J. Stat. Ann. § 2A:14-3. The facts relevant to the timeliness question include the May 9, 1983 filing date of these suits, and the July 19 filing date of the amended complaints. Service of the original complaints was attempted by the mailing of the complaints to Corporation Trust Company (CT Co.), the New Jersey registered agent of Time, Inc. The complaints were mailed on May 20, 1983, and received by CT Co. on May 23, 1983. Time, Inc. refused to accept service because it was not named as a party. Service of the

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amended complaints was made by certified mail on July 21, 1983 to the Office Manager of Fortune at the Time and Life Building in New York. Service was also made personally upon Walter Censor, at the Corporate Law Department of Time, Inc.

The magazine cover contained a date of May 31, 1982. However, the record before the court indicates that publication of the magazine, for purposes of determining the limitations period, occurred substantially before this date. The affidavit of Steven M. Gutman, Operations Manager of Fortune, indicates that subscription copies of Fortune were mailed on May 12, and received by subscribers on May 13-19. Newsstand copies were on sale beginning May 17. A press release was issued on May 11, and copies of the magazine were mailed to representatives of the press on that date.

This court has previously determined that, under New Jersey law, publication of an alleged libel does not necessarily occur on the date that appears on a magazine's cover. *MacDonald* v. *Time, Inc.*, Civil No. 81-479 (D.N.J. August 25, 1981). "The date upon which a substantial distribution occurs triggers the statute of limitations for any and all actions arising out of that publication, even though a large number of people might read the article subsequent to that date." *Id.* at 4. The uncontroverted affidavit of Mr. Gutman indicates that a "substantial distribution" of the May 31 Fortune occurred, at the latest, on May 19, 1982. It is not necessarily for purposes of this motion to determine the precise date which began the running of the limitations period.

Defendant Time, Inc. contends that the suits were not timely filed against it, although the original filings occurred within the limitations period. Time, Inc. urges that the

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July amendments to the complaints added it as a party after the limitations period had expired, and that the amendments do not relate back to the original filing d[illegible] because of failure to satisfy the requirements of Rule 15(c) of the Federal Rules of Civil Procedure. Rule 15(c) provides, in pertinent part:

> Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The second sentence of Rule 15(c) was added by amendment in 1966. An amendment that changes the party against whom a claim is asserted relates back to the date of the original pleading only if (1) the party to be added received some notice of the institution of the suit within the period provided by law for commencing the suit, and (2) within this period, knew or should have known that, but for a mistake, the action would have been brought against him. The earliest possible date upon which Time, Inc. could be said to have received notice of the institution of the action is May 23, 1982, the date upon which

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the original complaints were received by C.T. Corp. This date falls outside the one-year-limitations period for commencement of libel actions. Thus, if the amendments to the complaints were amendments "changing the party against whom a claim is asserted" within the meaning of the Rule, the amendments shall not relate back to the original filing date and the actions were not timely commenced against Time, Inc.

Plaintiffs raise essentially two arguments in opposition to defendant's position. They urge that the amendments to the complaints are not amendments "changing the party against whom a claim is asserted," but are merely amendments to correct a misnomer. As such, they urge that the notice requirements of Rule 15(c) are inapplicable. They also raise an equitable argument based on certain conduct of Time, Inc. that is claimed to have masked the identity of Fortune and misled plaintiffs.

The court first notes that it is difficult to characterize the amendments to these complaints as either amendments to correct a misnomer or amendments changing a party to the suits. The distinction between these two types of amendments is not a clearly defined one. *See Martz* v. *Miller Brothers Co.*, 244 F. Supp. 246, 249 (D. Del. 1965). One court has recently described the difference as follows:

> . . . the test is whether it is reasonable to conclude that plaintiff had in mind the proper entity or person, merely made a mistake as to the name, and actually served the entity or person intended; or whether the plaintiff actually meant to serve and sue a different person. (footnote omitted)

Munetz v. *Eaton Yale and Towne, Inc.*, 57 F.R.D. 476, 479 (E.D. Pa. 1973). *See also Martz*, 244 F. Supp. at 249:

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> If the amendment merely corrects a misdescription of the party intended to be sued for the purpose of proper identification, a misnomer is set to right. If, on the other hand, the amendment in effect brings in a new party, a new cause of action results and the amendment cannot relate back to the original complaint.

The court finds it unnecessary to determine which type of amendment is presented here. For the court finds that the notice requirements of Rule 15(c) are applicable to the amendments filed in these cases, whether they are characterized as amendments to correct misnomers or amendments changing a party. In *Craig* v. *United States,* 479 F.2d 35 (9th Cir.), *cert. denied,* 414 U.S. 1023 (1973), the court rejected plaintiff's contention that the second sentence of Rule 15(c) did not apply to amendments to correct misnomers. The court cited the following language from the Advisory Committee's Notes to the 1966 amendments to Rule 15:

> Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall "relate back" to the date of the original pleading.

Id.; See also 39 F.R.D. 82 for a complete text of the Committee Report. There may be some amendments to correct misnomers that would relate back without compliance with the Rule 15(c) notice requirements. But the amendments before the court appear to be within the contemplation of the Rule, which refers specifically to a "mistake concerning the identity of the proper party," in subdivision 2. The court concludes that the amendments cannot relate back to the filing of the original complaints because it has not been shown that Time, Inc. received notice of the institution of the action "within the period provided by law for commencing the action" against it.*

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The authorities cited by plaintiffs do not compel a different result. In *Montalvo* v. *Tower Life Building,* 426 F.2d 1135 (5th Cir. 1970), the court allowed an amendment adding Tower Life Insurance Co. as a defendant when the notice requirements of Rule 15(c) were met. In *Pittman* v. *Anaconda Wire & Cable Co.,* 408 F. Supp. 286 (E.D.N.C. 1974), an amendment naming Anaconda Co. as a defendant was permitted to relate back where Anaconda Wire & Cable Co. was a division of Anaconda Co., the complaint had been personally served on a plant manager before the limitations period expired, and "there was an awareness all along that charges of discrimination were outstanding. . . ." *Id.* at 291. In *Washington* v. *T.G. & Y. Stores Co. d/b/a T.G. & Y. Family Center,* 324 F. Supp. 849 (W.D. La. 1971), the court determined that amendments to correct misnomers are allowed under the first sentence of Rule 15(c). *Id.* at 856. The original complaint named T.G. & Y. Family Center, a trade name of the company. The amendment added T.G. & Y. Stores Co. as a

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* The court notes an apparent dispute among the courts as to whether this time period includes a reasonable period to effect service. *See Gabriel* v. *Kent General Hospital Inc.,* 95 F.R.D. 391 (D. Del. 1982). The parties have not presented this issue to the court. The court finds that the language of the rule, referring to commencement of the action, does not contemplate an added period for service of process. The court also notes that under the New Jersey court rules a civil action is commenced by the filing of a complaint. R. 4:2-2.

Appendix D

party. The court is not bound to follow this decision and finds its reasoning unpersuasive. In *Fashion Novelty Corp. of New Jersey* v. *Cocker Machine and Foundry Co.*, 331 F. Supp. 960 (D.N.J. 1971), the court allowed an amended complaint to relate back under Rule 15(c) when an additional plaintiff was named.

The court grants defendant's motion to dismiss on such technical grounds with great reluctance. However, any dismissal of a claim based upon the statute of limitations by its very nature is arbitrary. The legislature has established time periods in which actions must be instituted. Actions for defamation are clearly in a disfavored class and the shortest period is provided for the institution of such actions.

Furthermore, the federal rule has anticipated and dealt with the precise situation posed here. If a defendant has been improperly named but receives actual notice of the action before the statute of limitations expires, the complaint may be amended thereafter to cure the deficiency. On the other hand, if such notice is not received until after the period has expired, the deficiency cannot be cured.

The time for service provided for in the rules cannot extend the statute of limitations as fixed by the New Jersey Legislature. To permit such an extension would result in a federal rule of procedure extending a state established period of limitations.

Nor do the equities of this situation demand that relief be afforded to plaintiffs. The identity of the publisher of Fortune, namely Time, Inc., was readily ascertainable, indeed from the very magazine in which the defamation allegedly occurred. Undoubtedly there were numerous other available sources to verify and identify the correct defendant.

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The court rejects plaintiffs' contentions that the result should be different because Time, Inc. masked the identity of Fortune and misled them to name the wrong defendant. Both parties have submitted editorial pages from the May 31, 1982 issue of Fortune. The pages list officers of Fortune without specifically identifying them as officers of Time, Inc., and also contain a principal place of business of Fortune. However, the pages also state that Fortune is issued by Time, Inc., contain a copyright mark of Time, Inc., and state that Fortune is a registered mark of Time, Inc. There is no basis to conclude that Time, Inc. deliberately misled plaintiffs to believe that Fortune was a separate corporation.

If this result seems harsh, one should remember that plaintiffs created the danger of running afoul of the limitations period by filing the suit close to the end of the period and failing to make service within the period. "When filing this close to the deadline, the margin for error is slight. It is axiomatic that when the margin for error is slight, a slight error can be costly." *Tretter* v. *Johns-Manville Corp.*, 88 F.R.D. 329 (E.D. Mo. 1980) (amendment adding Johns-Manville Sales Corp. as a defendant did not relate back to filing date of original complaint which named Johns-Manville Corp. and Johns-Manville Products Corp.)

Defendant did nothing which misled plaintiffs. The information upon which plaintiffs admittedly relied was sufficient to place them on notice that Time, Inc. was the proper party.

In effect, plaintiffs have sued a trade name. Many companies, particularly manufacturers, market products under trade names and trademarks. Suits against such manufacturers are not properly instituted by naming the prod-

uct as the defendant. In essence that is what the plaintiffs have done here, although a publication rather than a product is involved. Although the result is harsh, because it deprives plaintiffs of their opportunity for a decision on the merits, it carries out the public policy underlying the legislation which established such time limitations. If there were a proper means of avoiding such result, that course would be preferable to the court, but it would not be appropriate for this court to substitute its own views for that firmly established by the legislature.

For the foregoing reasons, summary judgment is granted to Time, Inc., the only defendant properly in the case.

SUFFICIENCY OF THE PLEADINGS

Defendant also moves to dismiss the complaints because of insufficiency of the pleadings, or, in the alternative, for a more definite statement. Defendant contends that the complaints are insufficient because they do not set out the alleged defamatory words *in haec verba*, and because they do not allege, generally or specifically, that the article is false or defamatory.

None of the complaints contain the alleged defamatory words *in haec verba*. They describe the article by its title, and specifically mention the drawing on the cover of the magazine, an artist's drawing in the text of the article and "the text of the story . . ." describing " . . . the circumstances surrounding the alleged illegal payoff." (Schiavone complaint, ¶ 4). Attached as exhibits to the complaints are a copy of the cover (Exh. A), a copy of the artist' drawing (Ex. B), and copies of pages 85-86 of the article (Exh. C). The DiCarolis complaint alleges, in paragraph 6, that:

> [t]he text of the story, taken together with the artist's renderings and captions, photographs, taken as a whole, is defamatory and false to the damage of Plaintiff.

This paragraph is conspicuously absent from the other two complaints. The Schiavone and Liguori complaints do not specifically allege that the article was false or defamatory. In paragraph 7 of those complaints plaintiffs describe attempts to obtain a retraction from defendant by asserting "that the story is written in a fashion which would lead the average reader of ordinary intelligence to conclude that the material was substantially true." The Schiavone and Liguori complaints do not contain the words "defamation", "defamatory" or "libel" anywhere in the allegations.

Defendant contends that under the federal rules, when a cause of action is based on New Jersey law, a complaint in defamation must state the defamatory words *in haec verba*. In *National Bowl-O-Mat Corp.* v. *Brunswick Corp.*, 264 F.Supp. 221 (D.N.J. 1967), a complaint alleging defamation under New Jersey law was dismissed for failure to state a claim upon which relief can be granted. The defamation count was found to be insufficient because it did not state the defamatory words in *haec verba*. In *Bound Brook Water Co.* v. *Jaffe*, 284 F. Supp. 702 (D.N.J. 1968), the court dismissed the complaint on other grounds, with leave to amend. The court did observe, however, that allegations of libel and slander were insufficient to withstand a motion to strike because they did not set forth, *in haec verba*, the defamatory language. In *Kotok Building* v. *The Charvine Co.*, 183 N.J. Super. 101 (Law Div. 1981), the court dismissed as insufficient a conclusory allegation of defamation. The court observed that the plead-

Appendix D

ing failed "to recite the allegedly defamatory words, the circumstances in which they were uttered, whether a third party heard them, and what damaging effect their utterance had upon the defendant-counterclaimant's business or professional reputation." *Id* at 103. The court also recognized that the New Jersey rules of pleading require more specificity than do the federal rules of pleading.

The plaintiffs contend that, in this federal action Rule 8 of the Federal Rules of Civil Procedure governs the sufficiency of the pleading. Rule 8 provides, in pertinent part, that a pleading shall set forth "a short and plain statement of the claim showing that the pleader is entitled to relief . . ." In *Geisler* v. *Petrocelli*, 616 F.2d 636 (2d Cir. 1980), the court reversed an order dismissing a complaint for failure to state a claim for invasion of privacy under New York law. The court stated that the mode of pleading was governed by Rule 8. In *Liguori* v. *Alexander*, 495 F. Supp. 641 (S.D.N.Y. 1980), the court had before it a motion to dismiss a defamation claim for failure to set forth the allegedly defamatory words *in haec verba*. The court did not decide whether, under Rule 8, a federal defamation plaintiff must state the defamatory words. "What is clear, however, is that the allegations of the complaint must afford defendant sufficient notice of the communications complained of to enable him to defend himself." *Id.* at 647. Because the plaintiff indicated a willingness to amend his pleading the court granted leave to amend the complaint.

Although it is not clear from the authorities cited whether a federal defamation plaintiff must plead with specificity to satisfy the requirements of Rule 8, the court finds that these complaints do not give defendant sufficient notice of the claims to enable it to defend itself.

Appendix D

As previously noted, two of the complaints do not indicate clearly that the wrong alleged is defamation. None of the complaints pinpoint the language that is alleged to be defamatory. None of the complaints state clearly in what way the article is allegedly defamatory. Requiring that pleadings in defamation be at least this specific does not place an unfair burden upon plaintiffs.

> Defamation, if actionable at all, is complete when committed. While obviously there are many things to be discovered in the normal evolution of the case, yet the basic words themselves are available at once. Given the above factors it is not casting an onerous burden upon a plaintiff to require him to specify forthwith the defamatory words and the meaning plaintiff attaches to them. Only thus can a defendant be apprised of this charge attributed to him.

Kotok Building at 106.

Because these complaints are insufficient to state claims upon which relief can be granted, they shall be dismissed on this ground as well. Were it not for the court's determination that the complaint is barred by the statute of limitations, it would consider the propriety of permitting plaintiffs to file amended complaints. However, no purpose would be served for the reasons expressed above.

H. Lee Sarokin, U.S.D.J.

Date: November 30, 1983

Original to Clerk, U.S. District Court

cc: Connell, Foley & Geiser, Esqs.
Winne & Banta, Esqs.

APPENDIX E

Order of Dismissal of the United States District Court for the District of New Jersey

(Filed—December 9, 1983)

HONORABLE H. LEE SAROKIN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 83-1654 (SA)

RONALD A. SCHIAVONE,

Plaintiff,

v.

FORTUNE
also known as TIME, INCORPORATED,

Defendant.

THIS MATTER, having been opened to the Court by Winne, Banta & Rizzi (Peter G. Banta, Esq. appearing), attorneys for Time Incorporated, for an order, pursuant to Fed. R. Civ. P. 12(b)(6) and 56, dismissing plaintiff's complaint, as amended, in the presence of Connell, Foley & Geiser (Theodore W. Geiser, Esq. appearing), attorneys for plaintiff, and the Court having considered the moving papers and the arguments of counsel, and good cause having been shown;

Appendix E

IT IS on this 8 day of December, 1983

ORDERED that plaintiffs' Complaint, as amended, be and hereby is dismissed.

H. Lee Sarokin, J.D.C.

APPENDIX F

Order of Dismissal of the United States District Court for the District of New Jersey

(Filed—December 9, 1983)

HONORABLE H. LEE SAROKIN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 83-1655 (SA)

GENARO LIGUORI,

Plaintiff,

v.

FORTUNE
also known as TIME, INCORPORATED,

Defendant.

THIS MATTER, having been opened to the Court by Winne, Banta & Rizzi (Peter G. Banta, Esq. appearing), attorneys for Time Incorporated, for an order, pursuant to Fed. R. Civ. P. 12(b)(6) and 56, dismissing plaintiff's complaint, as amended, in the presence of Connell, Foley & Geiser (Theodore W. Geiser, Esq. appearing), attorneys for plaintiff, and the Court having considered the moving papers and the arguments of counsel, and good cause having been shown;

Appendix F

IT IS on this 8 day of December, 1983

ORDERED that plaintiffs' Complaint, as amended, be and hereby is dismissed.

H. Lee Sarokin, J.D.C.

APPENDIX G

Order of Dismissal of the United States District Court for the District of New Jersey

(Filed—December 9, 1983)

HONORABLE H. LEE SAROKIN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 83-1656 (SA)

JOSEPH A. DI CAROLIS,

Plaintiff,

v.

FORTUNE
also known as TIME, INCORPORATED,

Defendant.

THIS MATTER, having been opened to the Court by Winne, Banta & Rizzi (Peter G. Banta, Esq. appearing), attorneys for Time Incorporated, for an order, pursuant to Fed. R. Civ. P. 12(b)(6) and 56, dismissing plaintiff's complaint, as amended, in the presence of Connell, Foley & Geiser (Theodore W. Geiser, Esq. appearing), attorneys for plaintiff, and the Court having considered the moving papers and the arguments of counsel, and good cause having been shown;

Appendix G

IT IS on this 8 day of December, 1983

ORDERED that plaintiffs' Complaint, as amended, be and hereby is dismissed.

H. Lee Sarokin, J.D.C.

OPPOSITION

BRIEF

NO. 84-[illegible]

FILED
JUN 14 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RONALD A. SCHIAVONE, GENARO LIGUORI and JOSEPH A. DiCAROLIS,

Petitioners,

vs.

FORTUNE, also known as TIME, INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AND APPENDIX OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement of Questions Presented for Review

Contrary to the Questions Presented of petitioners (and, more particularly, question 1), there is not an even division between six Federal Circuits over the correct application of Fed. R. Civ. P. 15(c). The decision of the Court of Appeals below clearly reflects the majority rule in the Circuits.

Moreover, contrary to petitioners' question 2A, there is no conflict betwen the Courts of Appeals as to the application of Fed. R. Civ. P. 15(c) where a defendant has not received notice of the institution of plaintiff's action within the time period prescribed by such Rule, the only conflict being as to the definition of such time period.

As to the latter, the following additional question arises: Assuming arguendo that the clear and unequivocal language of Fed. R. Civ. P. 15(c) should be modified for policy reasons, is this not more appropriately the subject of the rule-making, rather than the adjudicative, process?

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I. Fed. R. Civ. P. 15(c) clearly and unequivocally provides that an amendment changing a party relates back only if the defendant received notice of the institution of plaintiff's action "within the period provided by law for commencing the action" (i.e., within the limitations period) 8

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RONALD A. SCHIAVONE, GENARO LIGUORI and JOSEPH A. DiCAROLIS,

Petitioners,

vs.

FORTUNE, also known as TIME, INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AND APPENDIX OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully prays that the Petition of Ronald A. Schiavone, Genaro Liguori, and Joseph A. DiCarolis for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

Opinions Below

While petitioners, in a Supplemental Appendix filed on or about June 1, 1985, submitted to the Court copies of the November 30, 1983 Opinion and December 8, 1983 Orders of the District Court dismissing petitioners' complaints, petitioners failed to include in their appendices the January 10, 1984 letter Opinion of the District Court affirming its prior ruling, entered in response to petitioners' motion for reconsideration. A copy of such Opinion is included in respondent's Appendix filed herewith. No separate orders were entered.

Constitutional Provisions, Statutes and Regulations Invoked

The following statutes invoked in this case are set forth verbatim in the Appendix hereto: 28 U.S.C. §2072 (1982) (originally enacted as Act of June 19, 1934, 48 Stat. 1064) and 28 U.S.C. §331 (1982) (originally enacted as Act of Sept. 14, 1922, Ch. 306, 42 Stat 838).

Statement of the Case

Petitioners commenced this libel action by filing separate complaints* on May 9, 1983, only a few days before the applicable statute of limitations was to run. (P.A. 3). Contrary to petitioners' Statement of the Case, the Courts below did not hold that substantial distribution of the FORTUNE Magazine article sued on took place *on* May 19, 1982 and that the New Jersey one-year statute of limi-

* Petitioners' actions, considered together in the District Court, were later consolidated by the Court of Appeals.

tations for libel expired *on* May 19, 1983. Rather, based on defendant's uncontroverted affidavit as to when such magazine was distributed to newsstands and subscribers,* the District Court and Court of Appeals found it unnecessary to determine the precise date on which the statute of limitations had run, holding that substantial distribution had occurred on May 19, 1982 "at the latest" and that the statute of limitations had run on May 19, 1983 "at the latest." (P.A. 3, 19).

Petitioners' complaints named as defendant "FORTUNE" and alleged that "FORTUNE" is a foreign corporation having its principal office at the Time and Life Building. (P.A. 16-17; P.A. 3). Since "FORTUNE" is not a separate legal entity and lacks capacity to be sued,** petitioners subsequently, on July 19, 1983, filed amended complaints naming as defendant "FORTUNE, also known as TIME, INCORPORATED." (P.A. 17).

Petitioners did not attempt to serve their complaints or otherwise provide, pursuant to Fed. R. Civ. P. 15(c), "notice of the institution" of their actions to Time Incorporated "within the period provided by law for commencing" their actions (i.e., within the limitations period).

* Subscription copies had been mailed on May 12, 1982 and received by subscribers from May 13 to May 19, 1982; further, the issue was distributed to newsstands on May 9, 1982 and was on sale on newsstands beginning May 17, 1982.

** Like TIME, LIFE and SPORTS ILLUSTRATED, FORTUNE, a registered mark of Time Incorporated, is the name of a magazine and an internal division of the Time Incorporated Magazine Group staffed by employees of Time Incorporated. (P.A. 3, 17). Each edition of FORTUNE Magazine, moreover, contains on its table of contents page a copyright notice in the name of Time Inc. and a postal notice that FORTUNE is "[i]ssued biweekly by Time Inc., ..." (P.A. 25).

Not until May 20, 1983 did petitioners' counsel forward, by letter, the summonses and complaints in these actions to Corporation Trust Company, pursuant to Fed. R. Civ. P. 4(c)(2)(c)(ii). (P.A. 3). Such correspondence was not received by Corporation Trust Company, the registered agent in New Jersey for Time Incorporated (and Time Incorporated therefore was not afforded notice of the institution of this action) until May 23, 1983. (P.A. 3). The May 20, 1983 correspondence from petitioners' counsel, moreover, not only acknowledged (contrary to the allegations in petitioners' complaints) that FORTUNE is published by Time Incorporated but also made reference to a recent litigation in which one of the petitioners had correctly named Time Incorporated as a defendant.*

Time Incorporated declined to acknowledge service of petitioners' original complaints, not, as petitioners suggest in their Statement of the Case, because of a misspelling, but because Time Incorporated had not been named as a party defendant in petitioners' actions. (P.A. 3-4). Even when petitioners filed their amended complaints in July 1983, they did so in a manner calculated to downplay their past error (e.g., naming as defendant "FORTUNE, also known as TIME, INCORPORATED") and continued to make allegations concerning "FORTUNE'S" corporate status which petitioners knew or should have known to be erroneous. (P.A. 17). For this reason, Time Incorporated declined again to acknowledge service, and petitioners ultimately served the amended complaints on Time Incorporated personally.

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* The May 20, 1983 correspondence, contained in the record below and attached to the Affidavit of Defendant in Support of Motion to Dismiss, is included at Defendant's Appendix. The litigation to which the correspondence refers is *Schiavone Constr. Co.* v. *Time, Inc.*, 569 F. Supp. 614 (D.N.J. 1983).

The District Court dismissed petitioners' complaints on November 30, 1983, holding that petitioners' original actions were barred by the statute of limitations and that petitioners' July 1983 amendments did not relate back under Fed. R. Civ. P. 15(c). (P.A. 17-24). In so holding, the District Court noted:

> [T]he federal rule [Rule 15(c)] has anticipated and dealt with the precise situation posed here. If a defendant has been improperly named but receives actual notice of the action before the statute of limitations expires, the complaint may be amended thereafter to cure the deficiency. On the other hand, if such notice is not received until after the period has expired, the deficiency cannot be cured.

(P.A. 24). The District Court also rejected petitioners' argument that the equities demanded a different result:

> The identity of the publisher of Fortune, namely Time, Inc., was readily ascertainable, indeed from the very magazine in which the defamation allegedly occurred. Undoubtedly there were numerous other available sources to verify and identify the correct defendant.
>
> * * *
>
> If this result seems harsh, one should remember that plaintiffs created the danger of running afoul of the limitations period by filing the suit close to the end of the period and failing to make service within the period.
>
> * * *
>
> Defendant did nothing which misled plaintiffs.

(P.A. 24-25). In applying the clear and unequivocal language of Rule 15(c) and determining that the applicable

statute of limitations had expired, the District Court concluded that "it would not be appropriate for this court to substitute its own views for that firmly established by the legislature." (P.A. 26).

In response to petitioners' subsequent motion for reconsideration, the District Court, after hearing oral argument, affirmed its prior ruling, by letter Opinion dated January 10, 1984, set forth in the Appendix hereto.

The Court of Appeals affirmed the District Court's rulings on December 10, 1984. (P.A. 2). In so doing, the Court of Appeals rejected petitioners' proffered "identity of interest exception" to Rule 15(c) as having no support in the Rule or in the Advisory Committee's Note to the Rule (P.A. 5-6) and held that the language of Rule 15(c) is "clear and unequivocal," requiring that notice to the defendant occur within the statutory limitations period (and not such period extended to include time for service of process). (P.A. 6-8). Further, the Court of Appeals noted that it was not its role "to amend procedural rules in accordance with our own policy preferences." (P.A. 8).

Petitioners' application for a rehearing was denied by the Court of Appeals *en banc* on February 13, 1985. (P.A. 14).

Summary of Argument

The language of Fed. R. Civ. P. 15(c) is clear and unequivocal. An amendment changing a party relates back only if "within the period provided by law for commencing the action against him," such party has received "notice of the institution of the action." This did not happen in this case. As the Advisory Committee's Note to Rule 15(c)

states, "the period provided by law for commencing the action" means "the applicable limitations period." 39 F.R.D. 82, 83 (1966). The construct placed on Rule 15(c) by certain courts and espoused by petitioners—which would include in the foregoing period a "reasonable" time for service—not only has absolutely no foundation in Rule 15(c) or the Advisory Committee's Note thereto, but it also creates uncertainty with regard to statutes of limitations, where certainty is imperative.

Moreover, the "construction" of Rule 15(c) espoused by petitioners would involve an impermissible rewriting of the Rule by this Court. Assuming arguendo that there are policy reasons that would support a modification of the language of the Rule, this is properly the subject of the rule-making, and not the adjudicative process, especially where, as in this case, there are no persuasive equities in favor of petitioners.

Finally, as the Advisory Committee's Note states, Rule 15(c) applies equally to amendments to correct a misnomer and amendments changing a party. 39 F.R.D. 82 (1966). Thus, petitioners' "identity of interest" argument has relevance only where the entity that has an "identity of interest" with the defendant ultimately named received notice of the institution of the action within the period provided by law for commencing the action against him. In this case, neither "FORTUNE" nor Time Incorporated had such notice.

ARGUMENT

I. Fed. R. Civ. P. 15(c) clearly and unequivocally provides that an amendment changing a party relates back only if the defendant received notice of the institution of plaintiff's action "within the period provided by law commencing the action" (i.e., within the limitations period).

Fed. R. Civ. P. 15(c) specifically provides that an amendment changing a party* relates back only if

> *within the period provided by law for commencing the action against him,* the party to be brought in by the amendment (1) *has received* such *notice of the institution of the action* that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(Emphases added). The quoted language of the Rule is explicit and unambiguous. If, as in this case, the party to be brought in by the amendment has received *no* notice of the institution of the action within the limitations period,** the amendment does not relate back.

---

* The Advisory Committee's Note to Rule 15(c) states that an amendment changing a party includes also "an amendment to correct a misnomer or misdescription of a defendant." 39 F.R.D. 82 (1966).

** The Court of Appeals correctly held that Rule 15(c) requires notice of the actual "institution of the action" not, as petitioners argued, notice that an action "might ensue." (P.A. 7). *Craig* v.

(Footnote continued on following page)

The meaning of the phrase "within the period provided by the law for commencing the action" is plain and self-evident; it means within the limitations period. Any possible question about the phrase's meaning is dispelled by the Advisory Committee's Note to Rule 15(c). As the Court of Appeals indicated (P.A. 7), the Advisory Committee's Note specifically states that:

> An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of "arising out of the conduct * * * set forth * * * in the original pleading," and if, *within the applicable limitations period,* the party brought in by amendment, first, received such notice of the institution of the action—the notice need not be formal—that he would not be prejudiced in defending the action, and, second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party.

39 F.R.D. at 83. (Emphasis added).

The construct that petitioners ask this Court to engraft on Rule 15(c)—adding to "the period provided by law

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(Footnote continued from preceding page)

United States, 413 F.2d 854, 858 (9th Cir. 1969), *cert. denied,* 398 U.S. 987 (1969); *Archuleta* v. *Duffy's Inc.,* 471 F.2d 33, 35-36 (10th Cir. 1973); *Martz* v. *Miller Bros. Co.,* 244 F. Supp. 246, 254 (D. Del. 1965); *Bazzano* v. *Rockwell Int'l Corp.,* 439 F. Supp. 1167, 1171 (E.D. Mo. 1977), *rev'd on other grounds,* 579 F.2d 465 (8th Cir. 1978); *Holden* v. *R.J. Reynolds Indus.,* 82 F.R.D. 157, 162 (M.D.N.C. 1979); *Tretter* v. *Johns-Manville Corp.,* 88 F.R.D. 329, 331 (E.D. Mo. 1980); *Robbins* v. *Marine Transp. Lines, Inc.,* 531 F. Supp. 14, 15 (D.N.J. 1981).

for commencing the action" a reasonable period for service—is contrary to the clear and unequivocal language of the Rule and to the express statement of the Advisory Committee's Note to the Rule. While a few courts have adopted this approach in response to the sympathetic facts of a particular case and rewritten Rule 15(c), this Court should not engage in such an exercise. *See* discussion Point II, *infra*.

Moreover, contrary to the suggestion by petitioners, the Courts of Appeals are not evenly split on this issue. The decision of the Court of Appeals for the Third Circuit in this case reflects the majority rule, when considered with the Ninth Circuit decisions in *Craig* v. *United States*, 413 F.2d 854 (9th Cir.), *cert. denied*, 316 U.S. 987 (1969) and *Cooper* v. *United States Postal Service*, 740 F.2d 714 (9th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3733 (Apr. 16, 1985); the Tenth Circuit decisions in *Archuleta* v. *Duffy's Inc.*, 471 F.2d 33 and *Watson* v. *Unipress, Inc.*, 733 F.2d 1386 (10th Cir. 1984); the Seventh Circuit decisions in *Simmons* v. *Fenton*, 480 F.2d 133 (7th Cir. 1973), *Stewart* v. *United States*, 655 F.2d 741 (7th Cir. 1981), and *Hughes* v. *United States*, 701 F.2d 56 (7th Cir. 1983); and the Eighth Circuit decision in *Trace X Chemical, Inc.* v. *Gulf Oil Chemical Co.*, 724 F.2d 68 (8th Cir. 1983).* Further-

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* *Accord Martz* v. *Miller Bros. Co.*, 244 F. Supp. 246; *Janus* v. *J.M. Barbe Co.*, 57 F.R.D. 539 (N.D. Ohio 1972); *Munetz* v. *Eaton Yale and Towne, Inc.*, 57 F.R.D. 476 (E.D. Pa. 1973); *Bazzano* v. *Rockwell Int'l Corp.*, 439 F. Supp. 1167; *Magno* v. *Canadian Pac., Ltd.*, 84 F.R.D. 414 (D. Mass. 1979); *Holden* v. *R.J. Reynolds Indus.*, 82 F.R.D. 157; *Tretter* v. *Johns-Manville Corp.*, 88 F.R.D. 329 (E.D. Mo. 1980); *Robbins* v. *Marine Transp. Lines, Inc.*, 531 F. Supp. 14; *Anastasio* v. *Holiday Inns, Inc.*, 93 F.R.D. 560 (D.N.J. 1982); *Larry* v. *Penn Truck Aids, Inc.*, 94 F.R.D. 708 (E.D. Pa. 1982); *Murray* v. *United States Postal Service*, 550 F. Supp. 1211 (D. Mass. 1982); *Colonial Mortgage Service Co.* v. *Aerenson*, 603 F. Supp. 323 (D. Del. 1985).

more, contrary to petitioners' representations, the Sixth Circuit has not adopted the construction of Rule 15(c) espoused by petitioners. In fact, the majority in *Ringrose* v. *Engelberg Huller Co., Inc.*, 692 F.2d 403 (6th Cir. 1982), relied on by petitioners for this proposition, expressly refused to adopt this construction and disagreed with the concurring judge who did.

Thus the Courts of Appeals that have considered the issue are aligned five to two against petitioners' position. In addition, the decisions relied on by petitioners rest on assumptions that are unfounded, are subject to abuse, and create an uncertainty in this area which Rule 15(c) was intended to avoid.

The principal case relied on by petitioners—*Ingram* v. *Kumar*, 585 F.2d 566 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979)—relies, in significant part, on the admonition in Fed. R. Civ. P. 15(a) that "leave [to amend] shall be freely given when justice so requires." However, this admonition refers to amendments made after the period has expired for filing amendments as of right—amendments as to which no specific criteria are set forth in the Rule. In contrast, the relation back provisions of Rule 15(c) contain specific criteria that are clear and unequivocal for determining whether an amendment changing a party relates back—criteria which a court is not free to rewrite.

Underlying the decision in *Ingram* is the concern that a misnamed defendant should be treated no differently than a properly named defendant. 585 F.2d at 571. However, there are valid reasons for treating such defendants differently, as Rule 15(c) clearly does, and the distinction is neither anomalous nor unfair, as petitioners suggest.

The issue addressed by Rule 15(c) is what should be done where there is an amendment changing a party *after*

the statute of limitations has run. If petitioners in this case, for example, had not amended, their original complaints would have been dismissed because the defendant in such actions lacked capacity to be sued. Petitioners are not in the same position as plaintiffs who have sued a properly named defendant within the limitations period; if they were, there would be no need for Rule 15(c).*

Rule 15(c) reflects a balancing. Amendments changing a party relate back—but only in certain prescribed situations that are objectively definable. The cornerstone is notice—notice *within the limitations period.* Absent notice to a misnamed defendant, the amendment does not relate back. While in the case of a properly named defendant, timely filing of the action (which provides constructive notice) is sufficient; in the case of a misnamed defendant, actual notice is required.

The statute of limitations is not an approximate standard. Rule 15(c), applied in accordance with its clear meaning, preserves the necessary certainty in statutes of limitations. The "flexible" approach taken by *Ingram* "concomitantly erodes the efficacy inherent in establishing fixed periods within which to bring actions." *Holden* v. *R.J.*

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* Rule 15(c) treats a misnamed defendant and a properly named defendant differently in other respects as well. *See Tretter* v. *Johns-Manville Corp.,* 88 F.R.D. at 332:

> [T]hey are also treated differently with respect to their belief that they were meant to be sued. As to an original defendant, the defendant's belief that he was meant to be sued is irrelevant; defendant might believe someone else to be totally responsible for plaintiff's injuries. As to the additional defendant, however, the complaint does not relate back unless the defendant knew or should have known that, but for a mistake, he would have been named as a defendant. See Rule 15(c).

(Footnote omitted).

Reynolds Industries, 82 F.R.D. at 161 n.1. As noted in *Martz* v. *Miller Brothers Co.,* 244 F. Supp. at 256:

> [S]tatutes of limitations are not approximate goals to be aimed at. They cannot be extended willy-nilly by the court as it might extend the time for a brief to be filed. They are rules of law. The court cannot substitute its own assumptions, or notions of fair play, or reluctance to see controversies decided upon technicalities, for the clear mandate of the law.

Adopting this analysis, the Court of Appeals in this case properly affirmed the District Court's holding that:

> The time for service provided for in the rules cannot extend the statute of limitations as fixed by the New Jersey Legislature. To permit such an extension would result in a federal rule of procedure extending a state established period of limitations.

(P.A. 24).

Moreover, the "reasonable" period of service referred to in *Ingram* and the other cases relied on by petitioners has led to a disparity of result and distortion of the express provisions of Rule 15(c) that is totally inappropriate with respect to limitations periods. In *Ingram,* for example, service was not made until *five months* after the expiration of the limitations period while, in *Davis* v. *Krauss,* 93 F.R.D. 580 (E.D.N.Y. 1982), the Court, following *Ingram,* held that relation back was permissible where the amendment was not served until *ten months and twenty-one days* after the limitations period had expired.

The potential for abuse inherent in the *Ingram* approach is clear:

> Stretched to its limit, the decision would establish a rule that a party could be added at any time, re-

> gardless of his prior knowledge "within the period provided by law for commencing the action against him . . . of the institution of the action . . .," Rule 15(c), so long as he was served within a reasonable time after the limitations period expired. . . . [T]he exclusive focus in *Ingram* is on plaintiff's motives and knowledge, whereas Rule 15(c) clearly states that the defendant's knowledge of the institution of the action is determinative.

Holden v. *R.J. Reynolds Industries,* 82 F.R.D. at 160-61 n.1.

The *Ingram* analysis confuses the issue of when an action must be commenced (which is relevant to the notice requirement under Rule 15(c)) and how an action is commenced (which is not relevant to the notice requirement). *See Ingram,* 585 F.2d at 571. When an action must be commenced sets an outside limit on the period within which notice of the institution of the action must be received by a misnamed defendant. How an action is commenced (e.g., by filing, by service, etc.) is not relevant to Rule 15(c), as Rule 15(c) does not attempt to equate notice of the institution of an action received by a misnamed defendant with service of a complaint on a properly named defendant.

The service "artifice" created in *Ingram* in reality most frequently helps the plaintiff who has not been diligent and who has filed his complaint shortly before the limitations period expires. Such a plaintiff proceeds at his own risk, however, and should not have the benefits of a judicial rewriting of a clear and unequivocal rule. As the District Court properly noted in rejecting petitioners' equity argument:

> If this result seems harsh, one should remember that plaintiffs created the danger of running afoul of the limitations period by filing the suit close to the end of the period and failing to make service within the period. "When filing this close to the deadline, the margin for error is slight. It is axiomatic that when the margin for error is slight, a slight error can be costly." *Tretter* v. *Johns-Manville Corp.,* 88 F.R.D. 329 (E.D. Mo. 1980).

(P.A. 25). *Accord Stewart* v. *United States,* 655 F.2d at 742.

Petitioners' "equity" argument reduces to the argument that where petitioners are adversely affected by proper application of a rule of civil procedure, the rule should be ignored—or modified. However, proper and certain application of Rule 15(c) is especially appropriate because of its integral relationship with applicable statutes of limitations and, as the District Court correctly held, the equities did not demand that relief be afforded to petitioners. (P.A. 24).*

The identity of the proper defendant (Time Incorporated, the publisher of FORTUNE Magazine) was readily ascertainable by petitioners, "indeed from the very magazine in which the defamation allegedly occurred". (P.A. 24). Nor did Time Incorporated do anything to mislead

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* In contrast, in *Ingram,* plaintiff's position was considerably more sympathetic. Plaintiff in a medical malpractice action named as defendant Dr. Vijaya N. Kumar (of Jamestown, New York), having relied on the New York State Medical Directory to locate the neurosurgeon who had treated plaintiff's decedent in Illinois and who had subsequently moved to New York; it turned out that the physician who had treated plaintiff's decedent was actually Dr. Vijay S. Kumar (of Valhalla, New York).

petitioners. (P.A. 24). In fact, petitioners' counsel had referred to Time Incorporated as publisher of FORTUNE Magazine in its service letter. Also, reference was made in such letter to a recent suit by one of the petitioners based on an article in TIME Magazine and relating to the same general subject matter, in which Time Incorporated had been correctly named as defendant.

Finally, petitioners' argument that this case involved a misspelling or the use of a nickname—and that, therefore, no misnomer was involved—is not only obviously contrary to the facts in this case, as found by the Courts below (*see* P.A. 5), but it is at total variance with the position argued by petitioners below that this case involved an amendment to correct a misnomer and not an amendment changing a party (P.A. 5, 21).* Indeed it is inconsistent with petitioners' argument in a different point of their Petition. *See* Petition, Point II, at 15 (where petitioners refer to misnomers "where the original defendant is the intended defendant but is misnamed or misspelled").

Petitioners erroneously argue, in Point I of their Petition, that a "misnomer" is a confusion between two separate entities where the plaintiff names one while intending the other. This is precisely the opposite of what petitioners had argued in the Courts below and is contrary not only to the Advisory Committee's Note to Rule 15(c) and the examples of misnomer set forth therein but also to the cases interpreting Rule 15(c), including those relied on by

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* The Courts below correctly held that it made no difference which characterization was adopted since the Advisory Committee Note to Rule 15(c) "explains that an amendment to 'correct a misnomer or misdescription of a defendant' changes a party within the meaning of the rule." (P.A. 5-6; *see also* P.A. 22).

petitioners. *See, e.g., Martz* v. *Miller Brothers Co.*, 244 F. Supp. at 249; *Munetz* v. *Eaton Yale and Towne, Inc.*, 57 F.R.D. at 479. *See also Ingram* v. *Kumar*, 585 F.2d at 570, relied on by petitioners (distinguishing between amendments correcting a misnomer and amendments bringing in a truly new party and giving as examples of misnomer cases the situations where "the plaintiff names a corporation in the complaint instead of a partnership and serves a partner, or incorrectly spells, in a minor detail, the name of a defendant who is served").

In sum, given the clear and unequivocal language of Rule 15(c) and of the Advisory Committee Note thereto, the Court of Appeals properly held that petitioners' amendments did not relate back since Time Incorporated had not received notice of the institution of petitioners' actions within the limitations period—the period provided by law for commencing the actions.

II. Assuming arguendo that the clear and unequivocal language of Fed. R. Civ. P. 15(c) should be modified for policy reasons, this is properly the subject of the rule-making, not the adjudicative, process.

Petitioners urge this Court to rewrite Rule 15(c). Conceding that a "literal" reading of the Rule defeats their position, petitioners artfully avoid any reference to the Advisory Committee Note's explanation of the Rule, which is consistent with the Rule's plain meaning: "Within the period provided by law for commencing the action" means "within the limitations period." 39 F.R.D. 82, 83. Similarly, in *Ingram* v. *Kumar*, the case principally relied on by petitioners, the Court does not purport to be construing Rule 15(c) in accordance with its plain meaning; rather the Court puts a gloss on the Rule based on the Court's

confusion of when an action is commenced with how an action is commenced.* *See* discussion *supra,* at 15.

Numerous courts have rejected the *Ingram* approach to Rule 15(c) as "a judicial extension of the statute of limitations which . . . is beyond the proper role of the courts." *Larry* v. *Penn Truck Aids, Inc.,* 94 F.R.D. at 720 n.18. *See also Tretter* v. *Johns-Manville Corp.,* 88 F.R.D. at 332 ("Twisting the language of Rule 15(c) in an attempt to do equity in a particular case is uncalled for."); *Robbins* v. *Marine Transport Lines, Inc.,* 531 F. Supp. at 15.

Both the District Court and the Court of Appeals in this case correctly believed that rewriting Rule 15(c) was beyond their power. (P.A. 26,** 8***). This view is in accord with admotions from this Court. *See, e.g., Schlagenhauf* v. *Holder,* 379 U.S. 104, 121 ("The Federal Rules of Civil Procedure should be liberally construed, but they

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* Although on its face the phrase, "within the period provided by law for commencing the action against him," seems to mean the applicable statute of limitations period, such a literal interpretation is unjustified in jurisdictions where timely service of process can be effected after the statute of limitations has run. In those jurisdictions, even an accurately named defendant may not secure actual notice of the action against him prior to the running of the statute of limitations. Yet there is no doubt that the action against him is timely commenced.

585 F.2d at 571. (Footnote omitted).

** [I]t would not be appropriate for this court to substitute its own views for that firmly established by the legislature."

*** [I]t is not this court's role to amend procedural rules in accordance with our own policy preferences.

should not be expanded by disregarding plainly expressed limitations."); *Harris* v. *Nelson,* 394 U.S. 286, 298, *reh'g denied,* 394 U.S. 1025 (1969) ("We have no power to rewrite the Rules by judicial interpretations. We have no power to . . . unless, on conventional principles of statutory construction, we can properly conclude that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or the congressional understanding."); *Walker* v. *Armco Steel Corp.,* 446 U.S. 740, 750, n.9 (1980) ("The Federal Rules should be given their plain meaning.").

The rationale for this approach is fundamental. Congress has constitutional power to regulate the practice and procedure of the federal courts and has delegated such power to the Supreme Court by the Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. Sec. 2072 (1982)). *See Sibbach* v. *Wilson & Co.,* 312 U.S. 1, 7-10 (1941); *Hanna* v. *Plumer,* 380 U.S. 460, 472 (1965). In delegating this power, however, Congress has retained a review function with respect to the rule-making process; rules prescribed by the Supreme Court do not take effect until ninety days after they have been reported to Congress. *See* 28 U.S.C. §2072 (1982). Moreover, Congress has directed that the Judicial Conference play a significant role in the rule-making process:

> The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court of or the other courts of the United States pursuant to law. Such changes and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recom-

mended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

28 U.S.C. §331 (1982) (originally enacted as Act of Sept. 14, 1922, ch. 306, 42 Stat. 838).

In sum, the foregoing statutes dictate that rule changes be effected through the rule-making process and not by adjudication in a particular case. Petitioners are asking this Court to modify the clear and unequivocal language of Rule 15(c) in a manner contrary to the purpose of the Rule as reflected in the Advisory Committee's Note. If this issue is to be addressed by the Court (and by the Judicial Conference), it should not be by a grant of certiorari.

III. Petitioners' "identity of interest" argument is irrelevant where the incorrectly named defendant has not received notice of the institution of the action within the time period prescribed by Fed. R. Civ. P. 15(c).

The Court of Appeals correctly characterized petitioners' "identity of interest" argument as nothing more than a restatement of petitioners' argument that "the period provided by law for commencing the action" included a reasonable time for service and properly rejected petitioners' proffered exception as lacking support in Rule 15(c) or the Advisory Committee's Note. (P.A. 6). There is, contrary to petitioners' suggestion, no conflict between the Courts of Appeals on the "identity of interest" issue.

The critical distinction under Rule 15(c), dictated by the express language of the Rule, is between (i) the situation where a misdescribed defendant is served within the limitations period and an amended pleading is subsequently filed and (ii) the situation, as in this case, where

a misdescribed defendant is not served within the limitations period and an amended pleading is subsequently filed. *See* authorities cited *supra*, at 10-11. In the latter case, the amended pleading clearly does not relate back because notice of the institution of the action was not given within the period provided by law for commencing the action.

"Identity of interest" becomes relevant only where the party ultimately served has an "identity of interest" with an entity that had notice of the institution of the action within the limitations period (which notice can be imputed to the later named defendant). In this case, *neither* "FORTUNE" nor Time Incorporated had notice of the institution of petitioners' actions within the limitations period, as such notice was not afforded by petitioners until May 23, 1983—after the statute of limitations had run. Consequently, even assuming an identity of interest between "FORTUNE" and Time Incorporated, petitioners' argument misses the point.

All of the authorities cited by petitioners in support of their "identity of interest" argument involved situations in which the related entity received notice of the institution of the action *within the limitations period* and not, as in this case, the situation where no such notice was provided within the limitations period. *See Travelers Indem. Co.* v. *United States*, 382 F.2d 103 (10th Cir. 1967); *Bernstein* v. *Uris Bldg. Corp.*, 50 F.R.D. 121 (S.D.N.Y. 1970); *Wentz* v. *Alberto Culver Co.*, 294 F. Supp. 1327 (D. Mont. 1969); *Montalvo* v. *Tower Life Bldg.*, 426 F.2d 1135 (5th Cir. 1970); *Pittman* v. *Anaconda Wire & Cable Co.*, 408 F. Supp. 286 (E.D.N.C. 1976); *Cooper* v. *United States Postal Service*, 740 F.2d 714; *Korn* v. *Royal Caribean Cruise Line, Inc.*, 724 F.2d 1397 (9th Cir. 1984).*

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* Likewise, the discussion in *Ingram* of an "identity of interest" misnomer assumes that the related entity has received timely notice of the institution of the action. 585 F.2d at 570.

Similarly, Professors Wright and Miller, relied on by petitioners, note:

> When the named defendants and the party plaintiff actually intended to sue have an "identity of interest," an amendment adding the proper party will relate back *if the other requirements of Rule 15(c) have been satisfied.*

6 C. Wright & A. Miller, *Federal Practice and Procedure* §1499, at 516-17. (Emphasis added). Also, the law review article cited by petitioners for a "vicarious notice approach" in "identity of interest" cases (Note, *Federal Rule of Civil Procedure 15(c): Relation Back of Amendments*, 57 Minn. L. Rev. 83, 102-6 (1972)) expressly recognizes that absent an amendment to Rule 15(c), notice to a related entity must be provided *within the limitations period.*

Finally, petitioners' suggestion that relation back is appropriate if, within the statutory period a defendant has notice that litigation "might ensue," was correctly rejected by the Court of Appeals as inconsistent with the clear language of Rule 15(c). (P.A. 7). *See also* authorities cited *supra*, at 9.

Since petitioners' "identity of interest" argument rests on the premise that the intended defendant (Time Incorporated) received notice of the institution of the action within the time allowed for service of process (and *not* within the limitations period), "its persuasiveness does not turn on whether an identity of interest exists between the original and intended defendant." (P.A. 6). The Court of Appeals properly rejected such argument.

CONCLUSION

For the reasons hereinabove set forth, respondent Time Incorporated respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

WINNE, BANTA, RIZZI, HETHERINGTON & BASRALIAN
Attorneys for Respondent, Time Incorporated

By: JOSEPH A. RIZZI

Dated: June 11, 1985

[APPENDIX FOLLOWS]

APPENDIX

Letter Opinion of the United States District Court for the District of New Jersey, dated January 10, 1984

(Filed: January 12, 1984)

UNITED STATES DISTRICT COURT
District of New Jersey

Chambers of
H. Lee Sarokin
Judge

Room 329
U.S. Post Office Building
Newark, New Jersey 07102
(201) 645-2448
FTS (8) 341-2448

January 10, 1984

NOT FOR PUBLICATION

OPINION

Re: Ronald A. Schiavone v. Fortune Civil No. 83-1654
Genaro Liguori v. Fortune Civil No. 83-1655
Joseph A. DiCarolis v. Fortune Civil No. 83-1656

These cases are before the court on the motions of plaintiffs for reconsideration of this court's Opinion of November 30, 1983, and for leave to file amended complaints. The facts relevant to the court's prior determination are cited in the court's prior opinion and need not be repeated here. The court dismissed the complaints of plaintiffs for failure to timely commence the actions against Time, Inc. and for insufficiency of pleadings.

The court, in its prior opinion, considered the timeliness of amended complaints naming "Fortune, also known as Time, Inc." as defendants. The original complaints, naming "Fortune" as a defendant were filed before expiration of the statute of limitations. Service was made on an agent of Time, Inc. after expiration of the limitations period. The question decided was whether the amended complaints, also filed after the limitations period had expired, related back under Federal Rule of Civil Procedure 15(c)[1] to the date of the original complaint so as to be timely. The court concluded that the amendments could not relate back to this date because it had not been shown that Time, Inc. "received notice of the institution of the action 'within the period provided by law for commencing the action' against it." (footnote omitted). *Schiavone* v. *Fortune, also known as Time, Inc., No.* 83-1654, slip op. at 9 (D.N.J. November 30, 1983).

Plaintiffs urge that the court reconsider its ruling based upon *Ingram* v. *Kumar,* 585 F.2d 566 (2d Cir. 1978), *cert. denied,* 440 U.S. 940 (1979). In that case the court held that

[1] (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleadings arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

under Rule 15(c) the time within which a party to be added must receive notice includes a reasonable time allowed under the federal rules for service of process. *Id.* at 572. The court recognizes that there are other courts that have taken this position as well.

Defendant correctly notes that this court considered the question of whether the notice period includes a reasonable time for service of process after the limitations period has run, in its prior opinion although not raised by the parties. Slip op. at 9 n.1. This court recognized that there was a dispute among the courts concerning this issue, but concluded that the language of the rule "does not contemplate an added period of service of process." *Id.* Although the court did not cite the *Ingram* case the court did consider and reject its holding in the prior opinion. The court adheres to its earlier ruling that the time within which notice must be received by a party to be added under Rule 15(c) does not include a reasonable time for service of process after the limitations period has run.

Plaintiffs also urge that the joinder of Time, Inc. was timely under New Jersey law for the purposes of the statute of limitations. Plaintiffs rely on several New Jersey cases interpreting the state rule on relations back of amendments to pleadings. *Aruta* v. *Keller,* 134 N.J. Super. 522 (App. Div. 1975); *Farrell* v. *Votator Division of Chematron Corp.,* 62 N.J. 111 (1973). The New Jersey rule parallels Rule 15(c). R. 4:9-3. In *Farrell,* the court concluded that an amendment changing a party named as "John Doe" to the real defendant would relate back to the date of the original filing when the real defendant had not been served until after the limitation period had expired.

Letter Opinion of the United States District Court for the District of New Jersey, dated January 10, 1984

The court discussed the effectiveness of a John Doe complaint in tolling the statute of limitations. In *Aruta*, the court ruled that an amendment adding the correct defendants could relate back even though the parties to be added had not received notice of the action within the limitations period. The court determined that the New Jersey rule on relation back of amendments should be relaxed, pursuant to another court rule,[2] in the interests of justice.

Plaintiffs concede that these rulings interpreting the New Jersey Court Rule are procedural only, not substantive. As such, they do not bind this court in this diversity action. This court must follow Rule 15(c) of the Federal Rules of Civil Procedure, and not state law interpretation of a state rule. *See Britt* v. *Arvanitis*, 590 F.2d 57 (3d Cir. 1978) (holding that *Farrell* was merely an interpretation of a state procedural rule and was not controlling in a federal diversity action involving the substitution of a real party for a "John Doe" party under Rule 15(c). That case indicates that the interpretation of Rule 15(c) in this circuit conflicts with the interpretation of the parallel state rule by New Jersey's courts. However, plaintiffs urge that the reasoning of these New Jersey decisions is persuasive and consistent with those federal court decisions following *Ingram*. The court has considered the New Jersey decisions cited by plaintiffs, but reluctantly concludes that it is bound by the language of Rule 15(c) to adhere to its

[2] R. 1:1-2 Construction and Relaxation, provides in part: "Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice." The Federal Rules of Civil Procedure contain no such relaxation rule.

Letter Opinion of the United States District Court for the District of New Jersey, dated January 10, 1984

it is bound by the language of Rule 15(c) to adhere to its prior ruling. This outcome obviates the need to determine the motions to file amended complaints.

H. Lee Sarokin
U.S.D.J.

Original to Clerk, U.S. District Court

cc: Connell, Foley & Geiser, Esqs.
Winne, Banta & Rizzi, Esqs.

28 U.S.C. §2072 (1982)

Sec. 2072. Rules of Civil Procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

28 U.S.C. §331 (1982)

Sec. 331 Judicial Conference of the United States

The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial Conference of the United States. Special sessions of the conference may be called by the Chief Justice at such times and places as he may designate.

The district judge to be summoned from each judicial circuit shall be chosen by the circuit and district judges of the circuit at the annual judicial conference of the circuit held pursuant to section 333 of this title and shall serve as a member of the conference for three successive years, except that in the year following the enactment of this amended section the judges in the first, fourth, seventh, and tenth circuits shall choose a district judge to serve for one year, the judges in the second, fifth, and eighth circuits shall choose a district judge to serve for two years and the judges in the third, sixth, ninth, and District of Columbia circuits shall choose a district judge to serve for three years.

If the chief judge of any circuit or the district judge chosen by the judges of the circuit is unable to attend, the Chief Justice may summon any other circuit or district judge from such circuit. If the chief judge of the Court of Claims, or the chief judge

of the Court of Customs and Patent Appeals is unable to attend, the Chief Justice may summon an associate judge of such court. Every judge summoned shall attend and, unless excused by the Chief Justice, shall remain throughout the sessions of the conference and advise as to the needs of his circuit or court and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.

——The conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary, and shall submit suggestions to the various courts, in the interest of uniformity and expedition of business.

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

The Attorney General shall, upon request of the Chief Justice, report to such conference on matters relating to the business of the several courts

of the United States, with particular reference to cases to which the United States is a party.

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

Letter from Thomas S. Cosma, Esq. (Connell, Foley & Geiser) to Corporation Trust Company (May 20, 1983)

[Letterhead of Connell, Foley & Geiser]

May 20, 1983

Corporation Trust Company
28 West State Street
Trenton, New Jersey 08608

Re: Ronald A. Schiavone vs. Fortune, Civil Action No. 83-1654

Joseph A. DiCarolis vs. Fortune, Civil Action No. 1656

Genaro Liguori vs. Fortune, Civil Action No. 83-1655

Gentlemen:

You will please find enclosed herewith the Summonses and Complaints in the above matters, directed to FORTUNE. As you know, FORTUNE is a publication of Time, Incorporated and it is for that reason that we are serving you as the New Jersey registered agent for Time, Incorporated.

We have previously served you as registered agent of Time, Incorporated in connection with the civil Action entitled *Schiavone Construction Co. and Ronald A. Schiavone, Individually vs. Time, Incorporated,* Civil Action

Letter from Thomas S. Cosma, Esq. (Connell, Foley & Geiser) to Corporation Trust Company (May 20, 1983)

No. 83-932, pending in the United States District Court for the District of New Jersey.

Thank you for your kind attention to this matter.

Very truly yours,

s/ THOMAS S. COSMA

TSC/dp

Enclosures

REPLY BRIEF

84-1839
NO.

Office-Supreme Court, U.S.
FILED
JUL 12 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RONALD A. SCHIAVONE, GENARO LIGUORI and JOSEPH A. DiCAROLIS,

Petitioners,

vs.

FORTUNE, also known as TIME, INCORPORATED,

Respondent.

PETITIONERS' REPLY BRIEF

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NO.

IN THE

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OCTOBER TERM, 1984

RONALD A. SCHIAVONE, GENARO LIGUORI and JOSEPH A. DiCAROLIS,

Petitioners,

vs.

FORTUNE, also known as TIME, INCORPORATED,

Respondent.

PETITIONERS' REPLY BRIEF

ARGUMENT

The answering brief essentially speaks from the stance that Rule 15(c) can only mean what Time, Inc. and the Third Circuit say it does, to the conclusion that the Petition for Certiorari seeks a change in the Rule by the process of adjudication, whereas only the quasi-legislative route of Rule revision is appropriate.

This style of argument, from an *ipse dixit* pedestal, trivializes the Second Circuit opinion in *Ingram* v. *Kumar*, 585 F.2d 566 (2nd Cir. 1978), *cert. denied*, 440 U.S. 940 (1979) and the cases which have followed it, all composed by Judges whose perception of Rules is at least as unerring as Time, Inc.'s vision.

The reality is that the term in Rule 15(c), reading "within the period provided by law for commencing" an action, is not self-illuminating. So unsettled is the majority view that the debate continues with one District Court criticizing his Circuit's long held view. *Hughes* v. *United States*, 534 F. Supp. 352, 355-356 (N.D. Ill. 1982), *aff'd*, 701 F.2d 56 (7th Cir. 1982).

The "law" referred to in Rule 15(c), in a diversity case such as the instant proceeding, is state law. That, in turn, is usually an amalgam of limitations statutes, overlaid by construction and infused by policy, or it may be elastic as the doctrine of laches. Virtually the same is true of "commencing" an action, which may be as automatic as a clerk's filing stamp on a complaint, or as variable as a blend of filing, with the intention to accomplish service, followed by service within a reasonable time frame. *Covel* v. *Safetech, Inc.*, 90 *F.R.D.* 427 (D. Mass. 1981).

Given that Rule 15(c) was worded and designed to interact with a wide diversity of state dispositions, it contradicts reality to maintain that the term "within the period provided by law for commencing" has, or was ever intended to have, an automatic, computer-administered application in every case. Indeed, to maintain the contrary arrests the exploration of the Rule without illuminating the process.

While making much of the oft-cited Advisory Committee Note to the 1966 Amendment to Rule 15(c), Time neglects to address altogether criticism of the "wooden application"

of Rule 15(c) levelled by the man who, from 1960 to 1966, was reporter to the Advisory Committee on Civil Rules—Professor (later Justice) Benjamin Kaplan. *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Procedure* (1), 81 *Harv. L. Rev.* 356, 407-410 (1967).

The impetus for the 1966 amendment to 15(c), Professor Kaplan related, was the trial courts' "failure to reach for the purpose of the limitations period," most clearly exemplified by dismissals granted in several cases against the Government. These cases were harshly attacked by Professor Byse in a 1963 article.[1]

The purpose of the statute of limitations is served when a defendant receives the same notice he would have received had he been originally named at the outset.[2] Any interpretation of the Rule which violates that simple precept promotes injustice and should be rejected by this Court. Moreover, the Advisory Committee could not have intended such an anomalous result, as Professor Kaplan's intimation confirms. Kaplan, *op. cit.*, 81 *Harv. L. Rev.* at 410, n.204.

Respondent argues that the U.S. Supreme Court should stand aside from the existing conflict between the Circuits, since a decision which sustains the Second Circuit view would amount to a Rule change, mandating a role for the Judicial Conference and the Court's Advisory Committee on Rules of Civil Procedure. It demeans the cited Courts of Appeal to argue that their decisions exceeded any per-

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[1] Byse, Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform, 77 *Harv. L. Rev.* 40 (1963).

[2] See Byse, *Id.* at 45-46.

missible reading and so wrenched Rule 15(c) out of its frame as to rewrite it.[3]

Justice Stone wrote almost forty years ago: "The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency." *Mississippi Publishing Corp.* v. *Murphree,* 326 U.S. 438, 444 (1946). When a Federal Rule of Procedure has been erroneously construed to delimit consideration of the merits, the Court has been swift to return the balance to its intended position. See *Surowitz* v. *Hilton Hotels Corp.,* 383 U.S. 363 (1966) [Dismissal of shareholder derivative suit for inadequate Rule 23(b) verification reversed]; *Tiller* v. *Atlantic Coast Line R. Co.,* 323 U.S. 574 (1945) [Amendment under Rule 15(c) allowed in FELA suit where same general conduct, transaction and occurrence were found].

Except for its posture that the Petition for Certiorari should be denied, because there is nothing for the Supreme Court to decide, the brief of Time, Inc. adds nothing to the reality that the Courts of Appeals are divided over how they would apply Rule 15(c) to the instant case, and that

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[3] The Petition clearly indicated that Petitioner was relying upon Circuit Judge Jones' concurrence in *Ringrose* v. *Engelberg Huller Co., Inc.,* 692 F.2d 403 (6th Cir. 1982) in finding support for the *Ingram* view in that Circuit. Indeed, the majority in *Ringrose* remanded to determine whether sufficient notice was given to an intended defendant by suing an alleged successor corporation. 692 F.2d at 405.

In contrast, respondent asserts that *Trace X. Chemical, Inc.* v. *Gulf Oil Co.,* 724 F.2d 68 (8th Cir. 1983) subscribes to the majority view when in fact "notice" under 15(c) was not an issue in the case, and the Eighth Circuit did not discuss (and has not since discussed) the authorities in contraposition, 724 F.2d at 70.

only the Supreme Court can put the matter at rest, so that the administration of federal justice in respect of Rule 15(c) will no longer vary with geography. The one constant, which the Time, Inc. brief largely passes over, is that Rule 15(c) like every other civil Rule, must ". . . be construed to secure the just, speedy, and inexpensive determination of every action." F.R.C.P. 1. In this context, "just" means "on the merits." By that standard, any reading of any Rule, which has the consequence of blocking out the merits, is presumptively wrong, if the other result is possible. Time, Inc. has squarely planted its flag of argument to extinguish any liability on the merits, by precluding a trial of the merits. This might be a permissible approach on the ground that, of two admissible readings of Rule 15(c), it ought to be preferred for one reason or another. But it is not legitimate argument that only one reading is possible, the one for which Time, Inc. contends, and that the Supreme Court has no role, but to allow its silence to convey the judgment that the Second and some other Circuit Courts of Appeal did not comprehend what they were about, in deciding exactly opposite to the present contentions of Time, Inc.

As the Court, through Justice Black, stated in the year 15(c) was last amended:

> The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to

> an adjudication on the merits. Rule 23(b), like the other civil rules, was written to further, not defeat the ends of justice.

Surowitz, supra, 383 U.S. at 373.

For the rest, the Time, Inc. brief dwells upon animadversions about the plaintiff as a litigant. These compliments could be returned. It is true that the plaintiff could have speeded its arrival in court and that non-recondite research would have disclosed that while Time, Inc. reaches the public under the banner and format of Fortune, the incorporated name is Time, Inc. On the other side, if the initial-named defendant had been Time, Inc., it would not have learned of the suit one day earlier than it actually did, but would have been powerless to register a protest, much less to dismiss the action altogether, without regard to the merits. Thus, if plaintiff is at fault in precipitating the present issue, Time, Inc. is seeking to capitalize a "technicality" into immunity from a substantive liability, without having suffered one wit of prejudice. If that position prevails, it cannot be because the behavior of Time, Inc. as a litigant, is more edifying than that of the plaintiff.

CONCLUSION

It is respectfully submitted on behalf of the petitioners that the division of the Courts of Appeal over the application of F.R.C.P. 15(c) in diversity cases, confirmed by the respondent's brief, warrants certiorari, so that a single authentic reading of the Rule may be installed, nationwide.

Dated: July 10, 1985

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JOINT

APPENDIX

Sup. Ct. U.S.
FILED
NOV 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 84-1839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RONALD A. SCHIAVONE, GENARO LIGUORI and JOSEPH A. DiCAROLIS,
Petitioners,

vs.

FORTUNE, also known as TIME INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 13, 1985

CERTIORARI GRANTED OCTOBER 7, 1985

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD A. SCHIAVONE,

Plantiff,

against

FORTUNE,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

District Court Docket Entries Re: Schiavone v. Fortune (No. 83-1654).

DATE	PROCEEDINGS
5- 9-83	Complaint and jury demand filed.
5- 9-83	Notice of Allocation & Assignment filed. (Newark-Sarokin) Summons issued. (35 days)
7-19-83	*Amendment to complaint*, filed.
7-19-83	Summons on amendment to complaint issued. (10 days)

District Court Docket Entries Re: Schiavone v. Fortune (No. 83-1654)

7-29-83 Summons returned served on Walter Censor, Esq. Time Incorporated on 7-20-83 and on Fortune, a/k/a Time, Inc. on 7-21-83, filed.

8-30-83 Consent order extending time for defendant to answer amended complaint to September 9, 1983, filed. (Sarokin) Notice Mailed

9-12-83 Notice of motion of defendant to dismiss amended complaint or for summary judgment and in the alternative for more definite statement, returnable 10-11-83 proof of service, filed 9-9-83. (Brief submitted)

9-12-83 Affidavit of Donald A. Klein, filed 9-9-83.

9-12-83 Affidavit of Steven M. Gutman, filed 9-9-83.

9-12-83 Affidavit of Robert P. Marshall Jr., filed 9-9-83.

9-28-83 Affidavit of Theodore W. Geiser, filed.

9-28-83 Affidavit of service of copy of brief of plaintiffs in opposition to motion of defendant to dismiss and affidavit of Theodore W. Geiser etc., filed.

10-5-83 Proof of service of copy of reply brief of Time Inc.'s in support of motion to dismiss amended complaint or for summary judgment, filed.

10-13-83 Hearing on motion of defendant to dismiss amended complaint or for summary judgment and in the alternative, for more definite statement.
DECISION RESERVED. (Sarokin)10-11-83)

- 2-83 Opinion, filed 12-1-83. (Sarokin) (dismissing complaint) (Copy to NJLJ)

12- 9-83 Order dismissing complaint with costs in favor of defendant, Fortune, also known as Time Incorporated and against plaintiff, Ronald A. Schiavone, filed. (Sarokin) Notice Mailed

District Court Docket Entries Re: Schiavone v. Fortune (No. 83-1654)

12- 9-83 Notice of motion of plaintiff for reconsideration of the decision dismissing complaint or for permission to file second amended complaint returnable 1-9-84, filed 12-8-83. (Brief submitted)

12- 9-83 Affidavit of mailing of copy of notice of motion for reconsideration etc., filed 12-8-83.

1-11-84 Hearing on motion of plaintiffs for reconsideration of the decision dismissing complaint, etc. DECISION RESERVED. (Sarokin) (1-6-84)

1-13-84 Letter Opinion filed 1-12-84. (Sarokin) (Court bound by language of Rule 15 to adhere to its prior ruling, this obviates need to determine motions to file amended complaints.)

1-17-84 Notice of appeal of plaintiff, filed 1-13-84 at 4:04 P.M. USCA #84-50.

1-17-84 Copies of notice of appeal sent to Connell, Foley & Geiser, Esqs., Winnie, Banta, & Rizzi, Esqs. and Clerk, U.S.C.A.

1-17-84 Affidavit of mailing of copy of notice of appeal, filed 1-13-84.

1-23-84 Copy of transcript purchase order re hearings of 10-11-83 and 1-6-84, filed 1-19-84.

2-22-84 *Transcript* of hearing held on 10-11-83 filed 2-16-84.

2-22-84 *Transcript* of hearing held on 1-6-84 filed 2-16-84.

2-22-84 RECORD COMPLETE FOR PURPOSES OF APPEAL.

Court of Appeals Docket Entries Re: Schiavone v. Fortune (No. 84-5029).

DATE	FILINGS—PROCEEDINGS
1984	
March 12	Stipulation by cnsl for leave to consolidate appeals for briefing and disposition on the merits, filed. (Cvs 5029/31)
March 13	Order (Acting Clerk) granting above motion, filed. (Cvs. 5029/31)
July 9	Mot by applts for an order remanding jurisdiction of this matter to the D.C. for the limited purpose of considering the application under F.R.Civ.P. 60(b), w/request that an order be entered clarifying and modifying the 3 prior orders of this Crt dtd 12/8/83 so as to reflect that said orders warrant judgments in favor of the deft for the reason stated in the written opinions of the Crt dtd 11/30/83, and 1/12/84, w/serv, filed. (Cvs. 84-5029/31) (Send to Merits Panel)
July 9	Affidavit of Morris M. Schnitzer, Esq, cnsel for applt, in support of above mot, filed. (Cvs. 84-5029/31) (Send to Merits Panel)
July 13	Clerk's letter to cnsl for aplee written at dir of Ct. advising that Ct directs him to file a timely answer to aplt's mot for an order of remand (due 7-16-84). (Cvs 5029/31)
July 16	Response by aplee in opposition to aplts' motion for remand, filed. (Cvs 84-5029/31) (Send to Merits Panel)
July 16	Motion by aplts to file RB o/t, filed. (Cvs 5029/31)

Court of Appeals Docket Entries Re: Schiavone v. Fortune (No. 84-5029)

July 23	Letter-response by aplee in opposition to aplts' mot to file RB o/t, filed. (Cvs 5029/31)
Aug 1	Order (*Seitz*, Becker & Rosenn, C.J.) granting above motion, filed. (Cvs 5029/31)
Aug 24	Order (*Seitz*, Becker & Rosenn, C.J.) referring aplts' mot for order remanding jurisdiction to D.C., etc., to Merits Panel & each side may have 5 minutes to argue the motion at the time the merits are argued, filed. (Cvs 5029/31) (Send to Merits Panel)
Nov. 21	Clerk's letter to cnsl written at dir of Ct. requesting letter-responses on or before 12:00 noon on Tues., 11-27-84 since Ct. has noticed that apparently no order was entered implementing the opinion denying the motion for reconsideration, do we have an appealable order in this case. (Cvs 5029/31) (ad)
Nov. 26	Letter dated 11-22-84 from Theodore W. Geiser, Esq., cnsl for apits, w/encs rec'd. at dir of Ct. (Cvs 5029/31) (ad)
Nov. 27	Letter dated 11-26-84 from Peter G. Banta, Esq., cnsl for apee, rec'd. at dir of Ct. (Cvs 5029/31) (ad)
Nov. 29	Letter dated 11-27-84 from Thomas S. Cosma, Esq., cnsl for aplt, w/enc, copies of D.C. Orders denying Plaintiff's Motion for Reconsideration *Nunc Pro Tunc* in these matters, rec'd. for Ct's info. (Cvs 5029/31) (ad)
Dec. 31	Motion of Appellants (Schiavone, Liquori & DiCarolis to file petition for rehg. out of time, filed. w/serv (ch) (Covers 84-5029/30/31)

Court of Appeals Docket Entries Re: Schiavone v. Fortune (No. 84-5029)

1985	
Jan. 8	Order (SEITZ, CJ) Granting appellants leave to file pet. for rehg. on or before December 31, 1984, filed. (cvs. 84-5029/30/31) (ch)
Mar. 7	Receipt of the certified lists acknowledged by the Clerk of DC, filed. (cvs. 84-5029/30/31) (ch)

Court of Appeals Docket Entries Re: Schiavone v. Fortune (No. 84-5030

DATE	FILINGS—PROCEEDINGS
1984	
March 12	Stipulation by cnsl for leave to consolidate appeals for briefing and disposition on the merits, filed. (Cvs 5029/31)
March 13	Order (Acting Clerk) granting above motion, filed. (Cvs 5029/31)
	SEE DOCKET SHEET NO. 84-5029 FOR COMPLETE DOCKET ENTRIES
1985	
Jan. 8	Order (Seitz, CJ) Granting appellants leave to file pet. for rehg. on or before Dec. 31, 1984, filed. (cvs. 5029/30/31) (ch)
Mar. 7	Receipt of the certified lists acknowledged by the Clerk of DC, filed. (cvs. 84-5029/30/31) (ch)

Complaint re: Schiavone v. Fortune (No. 83-1654) (Filed: May 9, 1983).

CONNELL, FOLEY & GEISER
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UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW JERSEY.

RONALD A. SCHIAVONE,

Plaintiff,

vs.

FORTUNE,

Defendant.

Civil Action No.

Plaintiff, Ronald A. Schiavone, complaining of the Defendant says that:

1. Plaintiff is an individual residing at Lamington Road, R.D. #1, Whitehouse Station, New Jersey.

2. Defendant, Fortune, is a foreign corporation having its principal offices at Time and Life Building, Sixth Avenue and 50th Street, New York, New York 10020 engaged in the publication of a magazine called "Fortune" which is distributed throughout the world.

3. Jurisdiction in this matter is founded upon diversity of citizenship and the amount in controversy is in excess of $10,000.00.

4. In its issue dated May 31, 1982 Defendant published a story entitled "The Charges Against Reagan's Labor Secretary" which was the cover story for that issue, and said cover depicted an artist's rendering of Joseph A. DiCarolis, an officer of Schiavone Construction Co., making an illegal payoff on behalf of the Company to a labor union official and a copy of that cover is annexed hereto as Exhibit "A." Furthermore, in the same issue, Defendant published an artist's depiction of the same happening purporting to show that the alleged payoff was made in the presence of Plaintiff, a copy of which is annexed hereto as Exhibit "B." Furthermore, the text of the story in pertinent part (a copy of which is annexed hereto as Exhibit "C") describes in detail the circumstances surrounding the alleged illegal payoff.

5. Fortune conducted its own investigation in the preparation of the story.

6. At all pertinent times, Plaintiff was the principal shareholder, officer and director of Schiavone Construction Co.

Complaint re: Schiavone v. Fortune (No. 83-1654) (Filed: May 9, 1983)

7. On April 13, 1983 Plaintiff wrote to Defendant demanding a retraction and a copy of that letter is attached hereto as Exhibit "D," asserting that the story is written in a fashion which would lead the average reader of ordinary intelligence to conclude that the material was substantially true.

8. Under date of April 28, 1983 Defendant refused to retract by letter to Plaintiff bearing that date and a copy of that letter is attached hereto as Exhibit "E."

9. In its letter refusing to retract, Defendant referring to reports of a Special Prosecutor appointed pursuant to the provisions of the Ethics In Government Act said that "The editors of Fortune do not feel, and as a lawyer I agree with them, that the reports of the Special Prosecutor contain a conclusive finding of fact as to either the truth or falsity of [the] allegation."

10. The following is a quotation from page 14 of the findings of the Special Prosecutor issued and dated June 25, 1982:

> "The Special Prosecutor concludes that no credible evidence exists that a luncheon as alleged by Montuoro ever occurred."

11. The conduct of Defendant in conducting its investigation leading to the publication of Exhibits A, B and C, and in publishing Exhibits A, B and C, and in its conduct after publication, including but not limited to its refusal to retract, was negligent, as well as conscious,

Complaint re: Schiavone v. Fortune (No. 83-1654) (Filed: May 9, 1983)

wilful, malicious and deliberate as a consequence of which Plaintiff has suffered damage to his reputation as well as mental anguish.

WHEREFORE, Plaintiff demands judgment against Defendant for compensatory and punitive damages.

DEMAND FOR JURY

Plaintiff hereby demands a trial by jury as to all issues.

CONNELL, FOLEY & GEISER
Attorneys for Plaintiff
By Theodore W. Geiser
A Member of the Firm

Dated: May 6, 1983

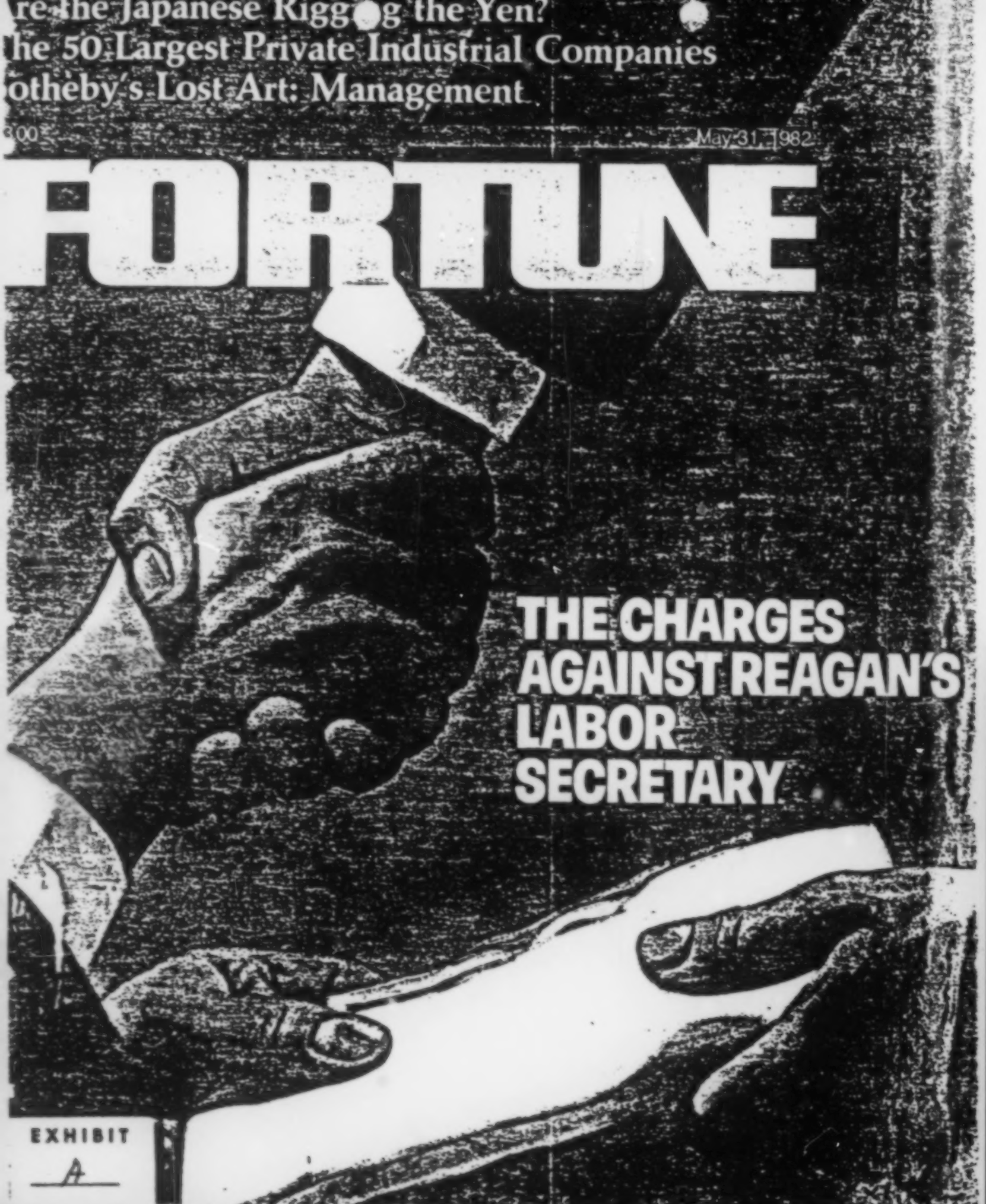
Exhibit A, Annexed to Complaint of Schiavone.

(See opposite page.)

re the Japanese Rigging the Yen?
he 50 Largest Private Industrial Companies
otheby's Lost Art: Management

$2.00 May 31, 1982

FORTUNE



THE CHARGES AGAINST REAGAN'S LABOR SECRETARY

EXHIBIT
A

Exhibit A, Annexed to Complaint of Schiavone

Exhibit B, Annexed to Complaint of Schiavone.

(See opposite page.)

AN INFORMANT'S TALE

The appointment of a special prosecutor to investigate Labor Secretary Raymond Donovan was forced by an allegation that Schiavone Construction Co. made a $2,000 payoff in 1977 to Louis Sanzo (third from left), boss of Blasters Local 29, at Prudenti's Vicino Mare Restaurant in Long Island City, New York. This is an artist's rendering of what Mario Montuoro (smoking), then an officer of Local 29, claims took place: Schiavone executive Ray Donovan (left) looks the other way, while Joe DiCarolis (second from left), another Schiavone executive, hands Sanzo an envelope containing 20 $100 bills. Others dispute Montuoro's tale: Donovan calls him a "damnable and contemptible liar," DiCarolis, Ronald A. Schiavone (viewed from the back), and Vice President Jerry Liguori (right) have signed affidavits that no such lunch occurred.

EXHIBIT
B

Exhibit B, Annexed to Complaint of Schiavone

Exhibit C, Annexed to Complaint of Schiavone.

(See opposite page.)

Anthony Villano (left, above), an undercover investigator, slips Blasters Union official Louis Sanzo $500, which the union boss tucks in his shirt pocket (right). The scene was photographed by another investigator.

Montuoro's story that required the a pointment of the special prosecutor und the Ethics in Government Act.

The Bribable Boss of the Blasters

In the course of an investigation into Local 29 of the Blasters Union, a New York State undercover agent, Anthony Villano, posing as a corrupt contractor from Atlanta seeking to break into the New York market, had lunch in 1978 with the local's president, Louis Sanzo. Sanzo promised Villano a sweetheart deal that would save him $1,000 a week in labor costs, and after lunch received a $500 handshake (above). Villano secretly taped the encounter.

In the shoptalk preceding negotiations, Sanzo, who has since been convicted on tax-evasion charges, brought up the success enjoyed by his local's biggest employer, Schiavone Construction.
Sanzo: That outfit of Schiavone's, you don't believe what he's got.
Villano: Well, I hope we'll do as well as him.
Sanzo: He's got $800-million work in New York alone.
Villano: Really?
Sanzo: Eight hundred million.
Villano: Holy crow! That's a lot of work.
Sanzo: Well, he's got the two subways, and another one's gonna come out any day now, that's $300 million alone. I'm sure he's gonna grab that.

risdictional dispute was the issue under discussion. Finneran says the problem was solved the next day at still another meeting, this one held at his association's headquarters.

Other information that is consistent with Montuoro's account of union corruption on Schiavone jobs came in a letter sent to the FBI just before the news came out that a special prosecutor had been appointed to investigate the alleged payoff at Prudenti's. "They didn't say what union it was," wrote a dissident sandhog, James Prather. "There was panic in the Local 147 office. Even when our officers found out it was only Local 29 being investigated, they burned up the phone calling the New Jersey office of Schiavone."

Donovan has repeatedly referred to Montuoro as "a damnable and contemptible liar." The other Schiavone executives have signed affidavits that no such lunch at Prudenti's took place. But Thomas Puccio, the Abscam prosecutor, who will resign later this month as head of the Organized Crime Strike Force in Brooklyn, considers Montuoro a credible witness. "The things he has told us turned out to be true," says Puccio, whose deputy used Montuoro's testimony in convicting Sanzo. It was Puccio's letter to Attorney General William French Smith describing

BEST AVAILABLE COPY

Exhibit C, Annexed to Complaint of Schiavone

Exhibit D, Annexed to Complaint of Schiavone.

Ronald A. Schiavone
c/o Schiavone Construction Co.
1600 Paterson Plank Road
Secaucus, New Jersey 07094

April 13, 1983

FORTUNE
Time and Life Bldg.
New York, New York 10020

Attention: William S. Rukeyser,
Managing Editor

Gentleman:

In your issue of May 31, 1982 the lead article and cover story was captioned "The Charges Against Reagan's Labor Secretary." In that article, at pages 85 and 86 the story contains material relating to an alleged illegal payment by Schiavone Construction Co. through an officer, Joseph A. DiCarolis (Joe DiCarolis) to one Louis Sanzo, a representative of a labor union in the amount of $2,000.00. The story is written in a fashion which would lead a reasonable reader to conclude that Fortune represented the material to be substantially true. In addition, on page 81 of the same issue the effect of the story relating to Prudenti's Restaurant and the alleged illegal transaction is magnified by a full page drawing purporting to depict the scene at Prudenti's Restaurant at the time of the transaction including an artist's rendering of myself as well as other officers of Schiavone Construction Co.

As you well know, a Special Prosecutor appointed under the provisions of the Ethics In Government Act

spent the better part of a year with the assistance of a trained staff of lawyers and law enforcement personnel and with the aid of a Federal Grand Jury investigating this allegation (as well as others) in the most minute detail. The Federal Grand Jury unanimously concluded that there was no basis upon which any indictment could be returned with respect to the Prudenti's allegation. The Special Prosecutor found that there was no credible evidence which would support the Prudenti's allegation.

Under the circumstances, it seems clear that I am entitled to an appropriate retraction. I have no wish to be unreasonable as to the form of retraction; I recognize that a cover story of the same dimensions as the original article would be out of proportion and I have no wish to be as unfair as you have been. However, the retraction ought to be something more than a simple box buried in some remote part of Fortune.

I enclose herewith a copy of the precise section of the text of the article to which this letter refers for your convenient reference. I do not believe that you can be so insensitive so as to fail to appreciate the agony which you have inflicted upon myself, my family and my friends, or that you would be so callous as to refuse to do your level best to rectify that harm. Unless I hear from you by May 1, 1983 I will assume that you decline to accommodate this request for retraction.

Very truly yours,

RONALD A. SCHIAVONE

RAS:af
Enclosure

Exhibit E, Annexed to Complaint of Schiavone.

TIME
Incorporated

Magazine Group

Law Department

Time
Life
Fortune
Sports Illustrated
Money
People
Discover

April 28, 1983

Mr. Ronald A. Schiavone
Schiavone Construction Co.
1600 Paterson Plank Road
Secaucus, New Jersey 07094

Mr. Joseph A. DiCarolis
Schiavone Construction Co.
1600 Paterson Plank Road
Secaucus, New Jersey 07094

Mr. Genaro Liguori
Schiavone Construction Co.
1600 Paterson Plank Road
Secaucus, New Jersey 07094

Dear Messrs. Schiavone, DiCarolis and Liguori:

Exhibit E, Annexed to Complaint of Schiavone

Your letters of April 13, 1983 addressed to William Rukeyser have been referred to me because, as you know, the Schiavone Construction Co. and Mr. Schiavone have instituted litigation against Time Inc. in the U.S. District Court for New Jersey.

The statement and illustration about which you are complaining were clearly and consistently identified as an allegation, and the source of this allegation, Mario Montuoro, was identified and his background was described. Fortune did not represent the allegation to be substantially true. Fortune believed that the allegations was newsworthy and important, and it reported it as such.

Fortune has reveiwed both reports of the Special Prosecutor and has continued to follow developments reflecting upon the matters discussed in its May 31, 1982 cover story. The editors of Fortune do not feel, and as a lawyer I agree with them, that the reports of the Special Prosecutor contain a conclusive finding of fact as to either the truth or falsity of Mr. Montuoro's allegation. What the Special Prosecutor did find was that there was "insufficient credible evidence" upon which to base a prosecution of Secretary of Labor Raymond Donovan, and this was reported by Fortune in its July 26, 1982 issue.

I can assure you that Fortune will continue to monitor developments in this matter. While there is no legal obligation that I am aware of to update a story to reflect subsequent events or a subsequent understanding, Mr. Rukeyser has authorized me to say on his behalf that should a clearer picture of the events discussed in its original article emerge he will consider whether additional coverage by Fortune is warranted. We are not yet, however, at that point.

Very truly yours,

ROBERT P. MARSHALL JR.
Associate Counsel

RPM/yv

Notice and Acknowledgment of Receipt of Summons and Complaint Re: Schiavone v. Fortune (No. 83-1654)

CONNELL, FOLEY & GEISER, ESQS.
GATEWAY I, SUITE 1600
NEWARK, NEW JERSEY 07102
(201) 643-2060

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RONALD A. SCHIAVONE,

Plaintiff(s),

vs.

FORTUNE,

Defendant(s).

Civil Action No. 83-1654

Hon. H. Lee Sarokin, U.S.D.J.

TO: Fortune
c/o Corporation Trust Company
28 West State Street
Trenton, New Jersey 08608

Notice and Acknowledgment of Receipt of Summons and Complaint Re: Schiavone v. Fortune (No. 83-1654)

The enclosed summons and complaint are served pursuant to Rule 4(c) (2) (C) (ii) of the Federal Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowiedgment of Receipt of Summons and Complaint was mailed on May 20, 1983.

THOMAS S. COSMA
CONNELL, FOLEY & GEISER, ESQS.
GATEWAY I, SUITE 1600
NEWARK, NEW JERSEY 07102
(201) 643-2060

Date: May 20, 1983

Notice and Acknowledgment of Receipt of Summons and Complaint Re: Schiavone v. Fortune (No. 83-1654)

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above captioned manner at Corporation Trust Company, 28 West State Street, Trenton, N.J. 08608.

_____

_____
Relationship to Entity/Authority
to Receive Service of Process

Date: _____

Amendment to Complaint Re: Schiavone v. Fortune (No. 83-1654)

CONNELL, FOLEY & GEISER, ESQS.
GATEWAY I, SUITE 1600
NEWARK, NEW JERSEY 07102
(201) 643-2060
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RONALD A. SCHIAVONE,

Plaintiff,

vs.

FORTUNE, also known as Time, Incorporated,

Defendant.

Civil Action No. 83-1654(SA)

Hon. H. Lee Sarokin, U.S.D.J.

Plaintiff, Ronald A. Schiavone, by way of Amendment to the Complaint filed herein on May 9, 1983, states:

Amendment to Complaint Re: Schiavone v. Fortune (No. 83-1654)

1. At all times hereinafter mentioned, Fortune, also known as Time, Incorporated, was and is a corporation of the State of New York with its registered agent in New Jersey being Corporation Trust Company, 28 West State Street, Trenton, New Jersey 08608.

2. Fortune, also known as Time, Incorporated, maintains its executive offices at the Time and Life Building, Sixth Avenue and 50th Street, New York, New York 10020.

3. Jurisdiction in this matter is founded upon diversity of citizenship with the amount in controversy exceeding $10,000.00.

4. Defendant is a corporation which is engaged in the issuance and publication of a weekly magazine entitled "Fortune."

CONNELL, FOLEY & GEISER, ESQS.
Attorneys for Plaintiff,
Ronald A. Schiavone

By: Theodore W. Geiser
A Member of the Firm

Dated: July 18, 1983

Consent Order (Filed: August 30, 1983).

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RONALD A. SCHIAVONE,

Plaintiff,

v.

FORTUNE, also known as Time, Incorporated,

Defendant.

Civil Action No. 83-1654(SA)

Honorable H. Lee Sarokin

THIS MATTER having been opened to the Court by Winne, Banta & Rizzi, attorneys for Time Incorporated, for an Order extending the time for Time Incorporated to respond to the amended complaint filed by plaintiff in the above-captioned matter, and Connell, Foley & Geiser, attorneys for plaintiff, having agreed to the terms of the Consent Order as hereinafter set forth, and good cause having been shown therefore;

IT IS on this 26 day of August, 1983

Consent Order (Filed: August 30, 1983)

ORDERED that the time for Time Incorporated to respond to plaintiff's amended complaint shall be and hereby is extended until Friday, September 9, 1983.

/s/H. LEE SAROKIN, J.D.C.

We hereby consent to the form and substance of the above order.

WINNE, BANTA & RIZZI
Attorneys for Time Incorporated

By: Donald A. Klein

Dated: August 23, 1983

CONNELL, FOLEY & GEISER
Attorneys for Plaintiff

By: Theodore W. Geiser

Dated: August , 1983

Affidavit of Donald A. Klein in Support of Motion To Dismiss or for Summary Judgment and, in the Alternative, for more Definite Statement.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RONALD A. SCHIAVONE,

Plaintiff,

v.

FORTUNE, also known as Time, Incorporated,

Defendant.

Civil Action No. 83-1654 (SA)

State of New Jersey,
County of Bergen, ss.

Honorable H. Lee Sarokin

DONALD A. KLEIN, of full age, being duly sworn according to law, upon his oath, hereby deposes and say:

1. I am a member of the firm of Winne, Banta & Rizzi, attorneys for Time Incorporated in the above-captioned matter.

Affidavit of Donald A. Klein in Support of Motion To Dismiss or for Summary Judgment and, in the Alternative, for More Definite Statement

2. I make this Affidavit in support of Time Incorporated's motion to dismiss plaintiff's complaint or for summary judgment and, in the alternative, for more definite statement.

3. On May 9, 1983, plaintiff Ronald A. Schiavone filed his complaint in this action, naming as defendant "Fortune."

4. Complaints were also filed on such date by Genaro Liguori (Civil Action No. 83-1655(SA)) and Joseph A. Di Carolis (Civil Action No. 83-1656 (SA)), naming "Fortune" as defendant.

5. By letter dated May 20, 1983 (a copy of which is attached hereto as Exhibit A), all three complaints were transmitted, pursuant to Fed. R. Civ. P. 4(c) (2) (c) (ii), by plaintiffs' counsel to the Corporation Trust Company, the New Jersey registered agent for Time Incorporated. No attempt was made by plaintiffs to serve these complaints before such time.

6. The May 20, 1983 correspondence was not received by Corporation Trust Company until May 23, 1983. (*See* Corporation Trust Company cover sheet attached hereto as Exhibit B.)

7. Because Time Incorporated was not named as the defendant, Time Incorporated declined to acknowledge service of the complaints.

8. Thereafter, I spoke to plaintiffs' counsel concerning the deficiencies in plaintiffs' pleadings and the service issue. I proposed two alternatives with respect to service:

Affidavit of Donald A. Klein in Support of Motion To Dismiss or for Summary Judgment and, in the Alternative, for More Definite Statement

1. Plaintiffs could amend their complaints to name as defendant Time Incorporated, and Time Incorporated would accept service of such amended complaints, reserving its right to argue that the amended complaints did not relate back, or

2. Plaintiffs could effect service of the original complaints, unamended, in the normal course, since Time Incorporated would not accept service of complaints naming "Fortune" as defendant.

8. Plaintiffs' counsel elected instead to file amended complaints naming as defendant "Fortune, a/k/a Time, Incorporated." Because Time Incorporated was still not named as the defendant, Time Incorporated again declined to acknowledge service, and plaintiff thereafter personally served the summonses and amended complaints in these actions on Time Incorporated.

9. I have also attached hereto as Exhibits C, D, E, F, and G respectfully, copies of the following documents from Volume 3 of the Report of Special Prosecutor Leon Silverman, issued on June 25, 1982. The cover page and table of contents pages of Volume 3 of the Report are attached hereto as Exhibit H.

1. Report of the Attorney General, December 23, 1981 (Appendix A).

2. Order Appointing Special Prosecutor (Appendix B).

3. November 27, 1981, memorandum from Thomas Puccio to D. Lowell Jensen (Exhibit 4).

Affidavit of Donald A. Klein in Support of Motion To Dismiss or for Summary Judgment and, in the Alternative, for More Definite Statement

4. FBI Report of December 3, 1981, Interview of Mario Montuoro (Exhibit 5).

5. December 4, 1981, memorandum from James D. Harmon to Thomas P. Puccio (Exhibit 84).

DONALD A. KLEIN

(Sworn to September 9, 1983)

Exhibit A to Klein Affidavit.

May 20, 1983

Corporation Trust Company
28 West State Street
Trenton, New Jersey 08608

Re: Ronald A. Schiavone vs. Fortune, Civil Action No. 83-1654
Joseph A. DiCarolis vs. Fortune, Civil Action No. 83-1656
Genaro Liguori vs. Fortune, Civil Action No. 83-1655

Gentlemen:

You will please find enclosed herewith the Summonses and Complaints in the above matters, directed to Fortune. As you know, Fortune is a publication of Time, Incorporated and it is for that reason that we are serving you as the New Jersey registered agent for Time, Incorporated.

We have previously served you as registered agent of Time, Incorporated in connection with the civil Action entitled *Schiavone Construction Co. and Ronald A. Schiavone, Individually, vs. Time, Incorporated,* Civil Action No. 83-932, pending in the United States District Court for the District of New Jersey.

Thank you for your kind attention to this matter.

Very truly yours,

THOMAS S. COSMA

TSC/dp
Enclosures

Exhibit B to Klein Affidavit.

SERVICE OF PROCESS TRANSMITTAL FORM

C T SYSTEM
C T Corporation System
The Corporation Trust Company

To: Time, Incorporated
Att. Legal Asst. Law Dept.
Time & Life Bldg.
Rockefeller Center
New York, NY 10020

To: C T Corporation System
New York, New York
From: C T Corporation System
Per Claire H. Pickup (CG)
Trenton, New Jersey
Date: 5/23/83 VIA: First Class Mail

VIA: Certified First Class Mail

RE: Process served in New Jersey for Time, Incorporated New York

Enclosed are copies of legal process served upon the statutory agent of the above company as follows:

1. Title of Action: Ronald A. Schiavone, Plaintiff vs. Fortune, Defendant

Exhibit B to Klein Affidavit

2. Document(s) Served: Letter dated May 20, 1983
Summons, Complaint, Jury demand, Notice of allocation & assignment
Exhibits, Notice & Acknowledgment in duplicate & self adressed envelope

3. Court: U.S. District Court for N.J.
Docket No. 83-1654

4. Nature of Action: Plaintiff demands compensatory & punitive damages alleging damages sustained due to a certain story published in issue dated May 31, 1982.

5. Process Served On: The Corporation Trust Company in New Jersey.
Process Received By: The Corporation Trust Company in New Jersey, by mail
From: Plaintiff's atty.
Envelope Post Marked May 20, 1983 enclosed.

6. Date and Hour of Service or Receipt: May 23, 1983

7. Appearance or Answer Due: 35 days

8. Plaintiff's Attorney(s): Connell, Foley & Geiser
Gateway I
Newark, N.J. 07102

9. Remarks: Discrepancy in corporate title noted. Letter from atty. indicates papers are for Time, Incorporated as publisher of Fortune. Service was made by mail pursuant to Rule 4(c) of the Federal Rules of Civil Procedure.

Exhibit B to Klein Affidavit

Important: Please note the enclosed unsigned copies of Notice and Acknowledgement for Service by Mail.

Received and Forwarded on 5/24/83

By: C T Corporation System
Per: V. COLVELL, Vice Pres.
1633 Broadway
New York, N.Y. 10019

Exhibit C to Klein Affidavit.

UNITED STATES COURT OF APPEALS

for the

DISTRICT OF COLUMBIA CIRCUIT

Special Prosecutor Division

Report of the Attorney General Pursuant to 28 U.S.C. §592(c)(1)	:	No. 81-2
Subject: Secretary of Labor Raymond J. Donovan	:	

In accordance with Section 592(c) (1) of Title 28, United States Code, as added by the Ethics in Government Act of 1978, Public Law 95-521, I, William French Smith, Attorney General of the United States, make the following application to the Court for the appointment of a Special Prosecutor.

1. Allegation

On September 21, 1981, an informant told an attorney in the Criminal Division of the Department of Justice that he was present at a meeting in May or June 1977 in a restaurant in Long Island City, New York when an official of Schiavone Construction Company made an illegal cash payment to a union official in the presence of Secretary of Labor Raymond J. Donovan, who at the time was Executive Vice-President of Schiavone Construction Company. I was informed of this matter for the first time on December 2, 1981.

Exhibit C to Klein Affidavit

2. Reasons for the Application for a Special Prosecutor

Section 186 of the Taft-Hartley Act, 28 U.S.C. §186, prohibits any knowing transfer of money from a statutory employer to a representative of a labor union with certain exceptions not pertinent here.[1] If the informant's allegation is true, the payment constitutes a violation of Section 186. As Secretary of Labor, Mr. Donovan is a person covered by the Special Prosecutor provisions of the Ethics in Government Act ("the Act") by virtue of being Secretary of Labor, 28 U.S.C. §591(b) (2).

Because the informant's allegation presents "specific information" that Secretary Donovan may have committed a federal offense, a preliminary investigation was undertaken by the Department of Justice. Secretary Donovan denied the allegation in an interview with the Department of Justice. The other three Schiavone officials allegedly present at the meeting also have denied the allegation in affidavits. No direct corroboration of the informant's allegation has been discovered.

The attorney representing the union official alleged to be the recipient of the payment has refused to permit his client to be interviewed with respect to the alleged transaction. It is impossible to complete this investigation without exhausting all appropriate legal means to obtain this official's testimony. Under the Act, it would be inappropriate for the Department of Justice to compel the union official's testimony either through grand jury subpoena or through court order after a grant of immunity. Such investigative steps are only available to a Special Prosecutor.

[1] A full text of 29 U.S.C. §186 is attached as an Appendix hereto. Violations of Section 186 are punishable by a fine of up to $10,000, or imprisonment of up to one year, or both.

Exhibit C to Klein Affidavit

3. Proposed Jurisdiction of the Special Prosecutor

I recommend that the jurisdiction of the Special Prosecutor include the investigative and prosecutive actions arising out of the allegation regarding the $2,000 payment. In addition, the Special Prosecutor's jurisdiction should include any allegations concerning the truthfulness of Secretary Donovan's testimony at his confirmation hearings on matters relating to the informant's allegation.

The Department of Justice has several active investigations involving Schiavone Construction Company which do not involve Secretary Donovan. Because of the complex, ongoing nature of the investigations, the Department intends to maintain jurisdiction over these matters, recognizing that if any specific information within the meaning of the Act is uncovered, the procedures mandated by the Act will be followed. To the extent the Special Prosecutor finds that such additional matters should be within his jurisdiction, he can apply to the Court or the Attorney General pursuant to 28 U.S.C. §594(e).

Because of the relatively brief time period left under the statute of limitations for the $2,000 allegation, I recommend that the Court move as expeditiously as possible in naming and having in place a Special Prosecutor. To this end I will make available any and all Department of Justice prosecutors and investigators who are familiar with this matter to serve in any manner the Special Prosecutor sees fit. The Special Prosecutor should possess the authority and duties provided in Section 594 of Title 28, United States Code.

Respectfully submitted,

WILLIAM FRENCH SMITH
Attorney General of
the United States

Dated: December 23, 1981

Exhibit D to Klein Affidavit.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2 September Term, 1981

Division for the Purpose of
Appointing Special Prosecutors

Ethics in Government Act of 1978

Before: Robb, Circuit Judge, Presiding, Lubard, Senior Circuit Judge, and Morgan, Senior Circuit Judge

ORDER APPOINTING SPECIAL PROSECUTOR

Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 592(c) (1) for the appointment of a special prosecutor to investigate the allegation that in May or June 1977, at Long Island City, New York, Secretary of Labor Raymond J. Donovan, who at that time was Executive Vice-President of Schiavone Construction Company, was present when an official of the company made an illegal cash payment to a union official, in violation of 29 U.S.C. § 186, it is

ORDERED that Leon Silverman, Esquire, of the New York bar, with offices at 1 New York Plaza, New York, New York 10004, be and he is hereby appointed Special Prosecutor to investigate this matter, and to prosecute for any violation of Federal criminal law disclosed by his investigation; and it is further

Exhibit D to Klein Affidavit

ORDERED that the Special Prosecutor shall have jurisdiction to investigate any allegation or evidence that Secretary Donovan's testimony concerning this matter at his confirmation hearings before the Labor and Human Resources Committee of the United States Senate was untruthful, and the Special Prosecutor shall have jurisdiction to prosecute for any violation of Federal criminal law disclosed by his investigation; and it is further

ORDERED that the Special Prosecutor shall have jurisdiction to investigate any other allegation or evidence of violation of any Federal criminal law by Secretary Donovan developed during the Special Prosecutor's investigations referred to above, and connected with or arising out of those investigations, and the Special Prosecutor shall have jurisdiction to prosecute for any such violation.

The Special Prosecutor shall have all the powers and authority provided by 28 U.S.C. § 594 (copy attached).

Per Curiam.

A true copy:
Test: George A. Fisher
United States Court of Appeals
for the District of Columbia

By: PATRICIA L. CHATMAN

§ 594. Authorities and duties of a special prosecutor

(a) Notwithstanding any other provision of law, a special prosecutor appointed under this chapter shall have, with respect to ail matters in such special prosecutor's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all in-

Exhibit D to Klein Affidavit

vestigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—

(1) conducting proceedings before grand juries and other investigations;

(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such special prosecutor deems necessary;

(3) appealing any decision of a court in any case or proceeding in which such special prosecutor participates in an official capacity;

(4) reviewing all documentary evidence available from any source;

(5) determining whether to contest the assertion of any testimonial privilege;

(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

Exhibit D to Klein Affidavit

(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 5003, 5004 and 5005 of title 13, exercising the authority vested in a United States attorney or the Attorney General;

(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General; and

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing information, and handling all aspects of any case in the name of the United States.

(b) A special prosecutor appointed under this chapter shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5.

(c) For the purposes of carrying out the duties of the office of special prosecutor, a special prosecutor shall have power to appoint, fix the compensation, and assign the duties, of such employees as such special prosecutor deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate

Exhibit D to Klein Affidavit

provided for GS-18 of the General Schedule under section 5333 of title 5.

(d) A special prosecutor may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such special prosecutor's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such special prosecutor's duties.

(e) A special prosecutor may ask the Attorney General or the division of the court to refer matters related to the special prosecutor's prosecutorial jurisdiction. A special prosecutor may accept referral of a matter by the Attorney General, if the matter relates to a matter within such special prosecutor's prosecutorial jurisdiction as established by the division of the court. If such a referral is accepted, the special prosecutor shall notify the division of the court.

(f) A special prosecutor shall, to the extent that such special prosecutor deems appropriate, comply with the written policies of the Department of Justice respecting enforcement of the criminal laws. Added Pub.L. 95-521. Title VI. §801(a), Oct. 26, 1978. 22 Stat. 1569.

Effective Date. Section effective Oct. 26, 1978 except for specific information required by the Attorney General pursuant to section of the title on determinations made by the Attorney General respecting such information, section of Pub.L. 95-521, set out as a section of this title.

Legislative history. For legislative history and purpose of Pub.L. 95-521. U.S.Code Cong. and p. 4216.

Exhibit E to Klein Affidavit

November 27, 1981

Allegation of Criminal Conduct by
Secretary of Labor Raymond J. Donovan

D. Lowell Jensen
Assistant Attorney General
Criminal Division

Thomas P. Puccio
Attorney-in-Charge
Brooklyn Strike Force

Nature of the Allegations

This office has received information that in 1977, Raymond J. Donovan and his company, Schiavone Construction Company, (hereinafter "Schiavone") may have committed violations of the Taft-Hartley Act (29 U.S.C. §186) as follows:

a.) In September or October 1977, Donovan, Ronald Schiavone, co-owner of Schiavone, Gennaro Liquori, subway tunnel project manager, Joseph DiCarolis, Schiavone operations vice-president, Louis Sanzo, president of Local 29, Blasters Drillrunners and Miners Union, and Mario Montuoro, a member of the Blasters Union dined together at Prudenti's Vicino Mare restaurant located in Long Island City, New York. During the course of the dinner, Donovan told Sanzo that the Blasters' Union was doing good work on the subway tunnel being constructed under the East River. In the presence of all those at the restaurant table, Donovan handed Sanzo an envelope saying words to the effect "That's for you, Louie." Later, when Sanzo and Montuoro left the restaurant together, Sanzo opened the envelope in Montuoro's presence and found that it contained two thousand dollars ($2000)

which he kept, except for two hundred dollars ($200) which Sanzo gave to Montuoro;

b.) By mid-1977, Sanzo held an undisclosed interest in Berth Ange Realty which owned real property consisting of a building and an adjoining vacant lot. The building and lot were leased by Cipico Construction, which was owned by Joseph Cippollone, a friend of Sanzo's. Before it could be used to store construction equipment of Cipico and Jo-Lo Leasing Corp. (another company in which Sanzo had a hidden interest), the vacant lot had to be levelled and cleared. Sanzo made arrangements to have two heavy bulldozers transported to the Cipico vacant lot on a weekend in July or August 1977. There, in the presence of Cipollone, Sanzo and Liquori, the lot was cleared by two bulldozers operated by Montuoro's brothers. The bulldozers were *believed* to be owned by Schiavone and used on the subway tunnel job. The bulldozers may have been transported on flatbed trucks belonging to "Louis Naji" (Phonetic) who did trucking work for Schiavone. No payment was made for the use of the bulldozers which, otherwise, would have cost about six thousand dollars ($6000). There is no known personal involvement of Secretary Donovan in this matter.

c.) During the years 1976 through 1978, four members of the Blasters' Union (Busso, Buananno, Ragone and Martin) were carried on the Schiavone payroll as no-show workers on the day shift of the subway tunnel job. Their paychecks totalling about eighty thousand dollars ($80,000) for the years involved were cashed and the proceeds were returned to Sanzo and Amadio Petito, secretary-treasurer of the Blasters' Union. An examination of the paychecks reveals that the endorsements on some are in different handwriting with the names of the

payees sometimes misspelled. The employees did report the salary as income on their respective income tax returns. There is no known personal involvement of Secretary Donovan in this matter. If this no-show situation did occur, the scheme could have been accomplished without the involvement of any Schiavone personnel. This is so because the paychecks were issued only after Petito verified the presence of each man on the job site.

Source of the Allegations

The primary source of the allegations against Donovan and Schiavone is Mario Montuoro. He is corroborated in the bulldozer affair by Joseph Cipollone and Montuoro's brothers. Montuoro's credibility may be affected by a criminal record consisting of four arrests, the two most serious occurring in 1969 for possession of heroin, and in 1974 for possession of a gun. More importantly, Montuoro is a dissodent in the Blasters' Union who twice has unsuccessfully lost a union election to Sanzo.

Montuoro's desire to seek revenge against Samuel Cavalieri, a member of the Luchese crime family who "owns" the Blasters' Union may also affect his credibility. Montuoro holds Cavalieri responsible for the murder of his son in 1977. By removing Sanzo from office, Cavalieri's control of the union would have been broken and Montuoro would have extracted his pound of flesh.

Nevertheless, Montuoro has always proven reliable in information which he has provided to the government. On June 23, 1981, Sanzo was convicted of two counts of tax evasion (26 U.S.C. §7201) and one count of conspiracy (18 U.S.C. §371) as a result of from eighty to two hundred thousand dollars ($80,000-$200,000) paid to him by a New York construction company. Montuoro was a government witness in that case. Sanzo has been sentenced to three

years imprisonment and a fine of twenty two thousand five hundred dollars ($22,500). The case is now on appeal.[1]

The Confirmation Hearings

In testimony before the Senate Committee on Labor and Human Resources, on January 12th and 27th, 1981, Donovan testified, variously, that Schiavone was never the victim of an extortion (Hearing transcript, pp. 124-25), or the subject of an attempted extortion (*Id.* at 310, 320). Nor did Schiavone ever engage in kickbacks on sweetheart contracts (*Id.* at 311). Donovan further testified that Schiavone never brought labor peace (*Id.* at 341-42, 345, 347). More directly, a question from the committee chairman, Senator Hatch, drew the following response from Secretary Donovan:

> Q. The point you're saying is, you have never paid off anybody? A. Absolutely not. (*Id.* at 335).

Donovan was also asked about his knowledge of the status of convicted labor racketeer Harry Gross[2] who was

[1]Amadio Petito was convicted of contempt (18 U.S.C. §401) and perjury (18 U.S.C. §1622), first for having refused to testify about payoffs received by Sanzo, then, for falsely denying that he had met with Samuel Cavalieri at particular time and place. Cavalieri was also convicted of contempt for refusing to testify about payoffs received by Sanzo. After a joint *Fatico* hearing, the district court found that Sanzo, Petito and Cavalieri were "involved in organized crime." Petito was sentenced to four years imprisonment and Cavalieri three years. The Sanzo, Petito and Cavalieri cases were developed as the result of a joint Department of Labor-IRS investigation.

[2]Gross is currently under indictment for racketeering (18 U.S.C. §1962) and other charges in a case being prosecuted by the Brooklyn Strike Force. One of the acts of racketeering charged involves Gross' no-show job as a Teamster foreman on the subway tunnel job.

on the payroll of Schiavone in a no-show job (*Id.* at 125-149, 320). Donovan testified that before the confirmation hearing, he was unaware that DiCarolis had testified before the grand jury concerning Gross. (*Id.* at 126, 320). Donovan was never asked, nor did he volunteer, that Liquori had also testified before a grand jury in the Southern District of New York on March 21, 1979 concerning the Blasters' Union alleged no-shows on the day shift.

Recommendation

In the event that a preliminary investigation is ordered pursuant to the Special Prosecutor Act (28 U.S.C. §591, *et. seq.*), it is recommended that the investigation be conducted by the Brooklyn-Queens office of the Federal Bureau of Investigation and the Internal Revenue Service in conjunction with a grand jury presentation directed by James D. Harmon, Jr., assistant attorney-in-charge, Brooklyn Strike Force. Such an investigation might include testimony of Sanzo and Petito compelled under a grand of immunity and interviews of others with relevant information. Despite lengthy negotiations subsequent to their convictions, Sanzo and Petito have declined to cooperate voluntarily.

We request that authorization be granted to apply for an immunity order pursuant to 18 U.S.C. §6001 to compel the testimony of Sanzo and Petito.

Exhibit F to Klein Affidavit.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 12/4/81

On December 3, 1981, Mario Montuoro was interviewed at the Eastern District Organized Crime Strike Force, 32 Tillary Street, Brooklyn, New York. The interview was conducted by Special Agents of the Federal Bureau of Investigation (FBI) Paul F. Nolan, Lewis D. Schiliro and William H. Lynch, Jr. Also present at the interview were Jerry Toner, Organized Crime Section, Department of Justice and James Harmon, Jr., Assistant Attorney in Charge, Organized Crime Strike Force, Eastern District of New York.

Mr. Montuoro was advised of agents' identities and official capacities and of the nature of the interview. Montuoro is currently a federal witness in a labor matter pending in the United States District Court, Eastern District of New York, and, in fact, testified at trial on December 3, 1981.

Mr. Montuoro stated he lives at 1435 Reed Place, Bronx, New York, 10465, telephone number 212-792-5460. In 1977, Montuoro was employed by the Blasters and Drillers Union, Local 29 and carried numerous titles including Field Representative, Secretary-Treasurer and Union Trustee and Assistant Administrator of Local 29. In 1977, the union office for Local 29 was located at 238 East 75th Street, New York, New York, telephone number 212-RE 7-1720.

Mr. Montuoro stated that in 1974 he suffered a 33% loss of hearing which he attributed to his job as a blaster.

Mr. Montuoro stated that in 1977, a construction project was in progress which Montuoro termed the Vernon

Exhibit F to Klein Affidavit

Boulevard project. The contractor operating this project was Schiavone Construction Company. Members of Local 29 worked this project exclusively in its area of labor jurisdiction.

Investigation on 12/3/81 at Brooklyn, New York

File No. BQ 211-32

SAs PAUL F. NOLAN, LEWIS D. SCHILIRO and WILLIAM H. LYNCH, Jr./WHL:icf

Date dictated 12/4/81 Exhibit 5

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency: it and its contents are not to be distributed outside your agency.

Mr. Montuoro explained that Local 29's major competitor in its area of labor jurisdiction was Local 147, whose members he termed as sand hogs. Members of Local 29 he referred to as blasters. Although the labor jurisdiction of these two locals differed in certain areas, there was also a common ground whereby these locals would be in direct competition for certain construction projects. The Vernon Boulevard project was one such project. Another project, termed by Montuoro as the 63rd Street project, was in its preliminary construction stages at that time and would also fall into the category of direct competition between Local 29 and Local 147.

Mr. Montuoro stated that there was a substantial difference from the contractor's point of view as to which local worked its projects. This stemmed from the individual contracts of each union local. Local 147's contract called for higher wages, more fringe beneifts, and

Exhibit F to Klein Affidavit

certain on the site benefits then did Local 29's contract. All of these costs were borne by the contractor.

In approximately May or June, 1977, Mr. Montuoro was told by Lou Sanzo to be available for a meeting with people from Schiavone Construction Company. Montuoro stated that Lou Sanzo is the President, Business Manager, and a member of the Executive Board of Local 29. Montuoro was not told the names of the individuals who would be at the meeting. However, Sanzo told Montuoro they were going to Prudenti's Restaurant to meet the bosses of Schiavone Construction Company.

On the day of this meeting, Montuoro and Sanzo drove to Prudenti's Restaurant in Long Island City, New York. On the way to the meeting, Montuoro and Sanzo stopped at the Vernon Boulevard project. Sanzo exited the car to speak to Sonny Petito, the foreman on the job for Local 29. Montuoro does not know the nature of this conversation.

Montuoro and Sanzo arrived at Prudenti's sometime between 12:00 noon and 1:00 PM, and were the first to arrive. Montuoro and Sanzo were seated in the restaurant and Montuoro sat with his back to a movable partition. Montuoro recalls he ordered Harveys Bristol Creme. Sanzo introduced Montuoro to the owner of the restaurant whose name he could not recall. Sanzo also talked to the waitress who seemed to know Sanzo. The table at which they were sitting was round.

After approximately ten minutes from their arrival, Montuoro and Sanzo were joined by Jerry Ligori, Ronnie Schiavone, Ray Donovan and Joe Di Carlo. Donovan was introduced to Montuoro as a Vice President of Schiavone and to Ronnie Schiavone; neither of whom he had ever met. Montuoro identified Ligori as the project manager for Schiavone Construction Company for the Vernon Boulevard project, and Joe DiCarlo as the project manager of the 63rd Street project for Schiavone Construction Company.

Exhibit F to Klein Affidavit

Mr. Montuoro stated that the seating arrangement at the table was as follows: Montuoro, with his back to a portable partition, then clockwise Jerry Ligori, Ron Schiavone, Ray Donovan, Joe Di Carlo, and Lou Sanzo.

Mr. Montuoro stated that initially the members of the party engaged in social conversation, then ordered drinks and food. At one point in the meeting, Joe Di Carlo began talking about the Vernon Boulevard project to Lou Sanzo. Di Carlo told Sanzo that the Vernon Boulevard project was a good job and that they (Schiavone) were very satisfied with the men from Local 29. Di Carlo took an envelope out of his jacket pocket and gave it to Sanzo telling Sanzo that this was a little token of our appreciation. Sanzo took the envelope and placed it in his jacket pocket.

At a later point in the meeting, Di Carlo talked to Sanzo about the new 63rd Street project. (Montuoro explained that this was a large project which already had some men from Local 29 on the site but was not yet in full operation). Di Carlo told Sanzo that he (Di Carlo) wanted Local 29 to handle the entire 63rd Street project. Further, that Sanzo would have to fight for the new project and would have to file a complaint with the General Contractors Association. (Montuoro explained that the General Contractors Association was the arbitrator for union jurisdictional disputes). Di Carlo made it very plain to Sanzo that Schiavone Construction wanted Local 29 to handle the 63rd Street project in a union dispute or in expressing preference for one union over another. This had to come in the form of a complaint from Local 29. Di Carlo stressed that everyone (Local 29 and Schiavone Construction) would benefit by having Local 29 win a dispute with Local 147 and that if Local 147 prevailed in this matter, that we (Schiavone) would lose money in addi-

Exhibit F to Klein Affidavit

tion to other problems which would occur with Local 147. Di Carlo told Sanzo that Sanzo would have to set up a meeting with the General Contractors Association and that he (Di Carlo) could not be involved.

Montuoro stated that the entire meeting lasted approximately an hour. The bill for the food and drink was paid by Jerry Ligori by credit card.

Montuoro stated that after returning to his car with Sanzo, Sanzo took out the envelope which had been given to him by Di Carlo. Sanzo told Montuoro that there was $2,000 in the envelope and gave Montuoro $200, which he accepted. Sanzo further told Montuoro that he (Sanzo) would keep $200 and "turn in" the remaining $1600. Montuoro stated that the term "turn in" referred to payments to organized crime but refused to further comment. Montuoro and Sanzo returned to the union hall and held no further discussion on this subject.

Mr. Montuoro stated that approximately a week or two after the meeting at Prudenti's Restaurant, Sanzo told Montuoro and Donnie Magliore (phonetic) (ph) that a meeting would occur with the General Contractors Association concerning the 63rd Street project. At this meeting, Sanzo, Montuoro, and Magliore (ph) represented Local 29. Representing Local 147 was Richard Fitzsimmons, President of Local 147. Also present was Joe Salabino, President of Local 731 (Laborers Local), and Joe Gambino and Mario Campanella, who were both delegates of Local 731. Either Ted King or Bill Fineran (ph) represented the General Contractors Association. Schiavone Construction was represented by Joe Di Carlo. Two other contractors were also present, as the 63rd Street Project was a joint venture. Crimmins was the name of one of the contracting firms and Montuoro could not recall the name of the third firm. Other individuals were also present whom Montuoro did not know.

Exhibit F to Klein Affidavit

During this meeting, Locals 29 and 147 argued over the jurisdiction of the 63rd Street project. At one point, Montuoro had an argument with Di Carlo and told Di Carlo that if the men from Local 29 did not do the job then nobody would do the job. Montuoro stated that this argument had been staged for the benefit of all present and that Sanzo had directed him (Montuoro) on what to say to Di Carlo. Montuoro stated the General Contractors Association would decide who worked on the project.

Montuoro stated that sometime subsequent to the above meeting, Local 29 received approxiamtely one third of the 63rd Street project.

Montuoro stated that he has previously related the facts concerning the restaurant meeting described above to the following individuals:

In 1978:

Steve Billers (ph) and Barry Silvers, both employees of the Department of Labor.

In 1979:

Edward J. Barnes, currently a Special Agent, State of New York, Commission of Investigation, 270 Broadway, New York, New York, telephone 212-577-0700.

Arthur Schwartz and Burton H. Hall, Attorneys, 401 Broadway, New York, New York, telephone 212-431-9114

Joyce Cole, Secretary for Lou Sanzo, Local 29.

Teddy (Last Name Unknown), who is running against John Cody in a union election on December 6, 1981.

Exhibit G to Klein Affidavit.

Memorandum

TPP:JDB:jo
Department of Justice

Subject

Allegations of possible criminal conduct by Secretary of Labor—Raymond Donovan

Date

December 4, 1981

To

Thomas P. Puccio
Attorney-in-Charge

From

James D. Harmon, Jr.
Assistant Attorney-in-Charge

In a memorandum dated November 27, 1981, which I prepared for your signature, it is stated that Raymond Donovan actually passed an envelope containing $2,000 to Louis Sanzo of the Blasters Union. This statement is incorrect and reflects a mistake on my part and does not consist of any change in information provided by Mario Montuoro. This mistake is a result of the passage of time between an interview with Montuoro and the preparing of the memorandum and represents nothing more than faulty recollection on my part.

Exhibit G to Klein Affidavit

In fact, Joseph DiCarolis was seated at the table in Prudenti's restaurant between Donovan and Sanzo. While seated next to Donovan, DiCarolis removed the envelope from his pocket and handed it to Sanzo.

Exhibit H to Klein Affidavit.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2 September Term 1982

Division for the Purpose of
Appointing Special Prosecutors
Ethics in Government Act of 1978

Before:

Robb, Senior Circuit Judge, Presiding, Lumbard, Senior Circuit Judge, and Morgan, Senior Circuit Judge

APPENDIX AND EXHIBITS TO
REPORT OF THE SPECIAL PROSECUTOR

Volume 3

June 25, 1982

Leon Silverman
Special Prosecutor

320.97
R29
V.3

REPORT OF THE SPECIAL PROSECUTOR

APPENDICES

Appendix Document

Exhibit H to Klein Affidavit

A Report of the Attorney General, December 23, 1981

B Order Appointing Special Prosecutor, December 29, 1981

REPORT OF THE SPECIAL PROSECUTOR

EXHIBITS

Exhibit Document

1 James Harmon's notes of his spring 1979 interview of Mario Montuoro

2 September 26, 1977, letter from Mario Montuoro to President Jimmy Carter

3 James Harmon's notes of his September 1981 interview of Mario Montuoro

4 November 27, 1981, memorandum from Thomas P. Puccio to D. Lowell Jensen

5 FBI Report of December 3, 1981, Interview of Mario Montuoro

6 December 11, 1981, *New York Times* Article

7 December 18, 1981, *Washington Post* Article

8 Montuoro sketch of Prudenti's

9 FBI scale drawing of Prudenti's

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10 FBI Report of December 10, 1981, Interview of Secretary Donovan

11 December 22, 1981, letter from Secretary Donovan to Attorney General Smith

12 December 18, 1981, letter from Dean Burch, Esq. to Attorney General Smith

13 Joseph DiCarolis affidavit of December 16, 1981

14 Gennaro Liguori affidavit of December 16, 1981

15 Ronald A. Schiavone affidavit of December 16, 1981

16 Mario Montuoro affidavit of December 19, 1978

17 William Montuoro affidavit of January 3, 1982

18 Saverio Montuoro affidavit of January 3, 1982

19 GCA letter agreement of April 20, 1976 between S-I-C and Local 147

20 Analysis of SCC, Schiavone Equipment Corp. and joint venture checking accounts

21 Analysis of Joseph DiCarolis banking records

22 Analysis of Gennaro Liguori banking records

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23 Analysis of R. Schiavone banking records

24 A. Schwartz handwritten notes

25 A. Petito Local 29 Pension Fund Record, 1977-1978

26 A. Petito Local 29 Pension Fund Employee's Earnings Record Card, May 19, 1978, through August 18, 1978

27 Department of Labor Report of February 27, 1979, Interview of Mario Montuoro

28 Catskill Town Justice's undated disposition of Sanzo traffic citation

29 Department of Labor Report of March 15, 1979, Interview of Mario Montuoro

30 Frank Russo Local 29 Pension Fund Record, 1976-1977

31 McNally Handwriting Analysis Report

32 FBI Report of February 6, 1981, Interview of Joseph G. Szapor

33 December 11, 1981, memorandum from L. Lauffer to Paul Coffey re: Szapor telephone call of December 7, 1981

34 FBI scale drawing of Casa Dante's

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35 FBI Report of January 13, 1981, Interview of Ralph Picardo

36 FBI Report of Second January 13, 1981, Interview of Ralph Picardo

37 FBI Report of January 15, 1981, Interview of Ralph Picardo

38 FBI Report of January 19, 1981, Interview of Ralph Picardo

39 FBI Report of January 26, 1981, Interview of Pat Kelly

40 February 3, 1981, *Washington Post* Article

41 June 8, 1981, *Time* Article

42 June 16, 1981, Letter from Senators Hatch and Kennedy to Director Wester

43 July 16, 1981, letter from Director Webster to Senators Hatch and Kennedy

44 July 10, 1981, Letter from Senators Hatch and Kennedy to Director Webster

45 August 10, 1981, Letter from Director Webster to Senators Hatch and Kennedy

46 December 30, 1981, memorandum from Andrew K. Ruotolo to Terence P. Flynn

47 December 22, 1981, memorandum from S. Michael Levin to Gerard T. McGuire

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48 February 10, 1981, Bergen *Record* Article

49 June 1, 1981, letter from Director Wesbster to Senators Hatch and Kennedy

50 February 8, 1981, *Sunday Record* Article

51 FBI Report of January 22, 1981, Interview of Albert Cecchi

52 February 9, 1981 Bergen *Record* Article

53 FBI Report of January 16, 1981 Interview of C. Banziger

54 FBI Report of January 16, 1981 Interview of Morris J. Levin

55 FBI Report of January 20, 1981 Interview of John O'Connell

56 FBI Report of January 22, 1981 Interview of Frederick S. Furino

57 FBI Report of May 4, 1982 Polygraph Examination of Frederick S. Furino (redacted)

58 FBI Report of February 2, 1981, Interview of Joan Torino

59 FBI Report of May 4, 1982, Polygraph Examination of Robert J. Santomenna (redacted)

60 Ronald Schiavone affidavit of March 15, 1982

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61 FBI Report of January 7, 1982 Interview of William P. Masselli

62 Joseph DiCarolis "From the Desk of" Paper

63 NYCTA Approval of Jopel as an SCC Subcontractor, March 13, 1980

64 FBI Report of February 9 and 12, 1980, Interviews of Louis R. Nargi

65 FBI Report of March 5, 1980, Interview of Louis R. Nargi

66 FBI Report of December 31, 1981, Interview of Morris J. Levin

67 FBI Report of December 30, 1981, Interview of Ted Geiser

68 FBI Report of January 22, 1981, Interview of Anthony Provenzano (in part)

69 Gregory Vasel affidavit of March 6, 1982

70 February 24, 1982, memorandum from S. Michael Levin to Gregory Joseph

71 FBI Report of January 23, 1981, Interview of James J. Donelan

72 May 20, 1982, letter from Senators Hatch and Kennedy to Special Prosecutor

73 May 26, 1982, letter from Dean Burch to Special Prosecutor

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74 Transcript of March 10, 1977, Adonis/Mazziotta conversation

75 May 29, 1982, letter from Kenneth P. Walton to Special Prosecutor

76 June 2, 1982, letter from Director Webster to Special Prosecutor

77 January 4, 1982, *Daily News* Article

78 May 31, 1982, *Washington Post* Article

79 FBI Report of January 20, 1982, Interview of Carl Levy

80 FBI Report of January 27, 1982, Interview of Jack Wolfson

81 Edmund Galke affidavit of February 14, 1982

82 April 22, 1980, memorandum from Joseph A. DiCarolis to SCC Executives, *et al.*

83 Calendar of SCC Principals' Locations May-June 1977

84 December 4, 1981, memorandum from James D. Harmon to Thomas P. Puccio

85 FBI Report of April 30, 1982, Interview of Kenneth E. Carter

86 FBI Report of July 11, 1975, Interview of Patrick Kelly

Exhibit H to Klein Affidavit

87 January 4, 1978, Agreement between The Trib and Empire News, Inc.

88 January 12, 1978, Agreement between Empire News, Inc. and NMDU

Affidavit of Robert P. Marshall Jr. in Support of motion to Dismiss or for Summary Judgment and, in the Alternative, for more Definite Statement.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RONALD A. SCHIAVONE,

Plaintiff,

v.

FORTUNE, also known as Time, Incorporated,

Defendant.

Civil Action No. 83-1654 (SA)

Honorable H. Lee Sarokin

State of New York,
County of New York, ss.

ROBERT P. MARSHALL JR., of full age, being duly sworn according to law, upon his oath, hereby deposes and says:

1. I am an attorney at law of the State of New York and I am Assistant General Counsel for Time Incorporated's

Affidavit of Robert P. Marshall Jr. in Support of Motion to Dismiss or for Summary Judgment and, in the Alternative, for More Definite Statement

Magazine Group Law Department. I have been an employee of Time Incorporated since 1976.

2. I make this Affidavit in support of Time Incorporated's motion to dismiss plaintiff's complaint or for summary judgment and, in the alternative, for more definite statement.

3. Fortune is not a corporation of the State of New York, as alleged by plaintiff, or a corporation of any other state. Nor is it the publisher of Fortune Magazine. Rather, Fortune is a registered mark of Time Incorporated and the name of the magazine published by Time Incorporated. Fortune is also an internal division of the Time Incorporated Magazine Group, created for administrative convenience and staffed by employees of Time Incorporated.

4. Each edition of Fortune Magazine, including the subject May 31, 1982 issue, contains on its table of contents page a copyright notice in the name of Time Inc. and a postal notice that Fortune is "[i]ssued biweekly by Time Inc., . . ." In the same notice are listed the names of the President, Treasurer, and Secretary of the corporation which publishes Fortune, Time Incorporated, in compliance with the New York General Business Law, Section 330. Attached as Exhibit A hereto is a copy of page 2 of the May 31, 1982 issue of Fortune Magazine, containing the foregoing notice.

5. In April 1983, I was forwarded letters written by plaintiffs in these three companion cases, dated April 13, 1983 and addressed to "Fortune, Time and Life Bldg., New York, New York, 10020," demanding a retraction of the subject Article. (Copies of plaintiffs' letters are attached as Exhibit D to plaintiffs' respective complaints).

Affidavit of Robert P. Marshall Jr. in Support of Motion to Dismiss or for Summary Judgment and, in the Alternative, for More Definite Statement

6. On April 28, 1983, I responded to plaintiffs' April 13, 1983 letters. My letter was addressed to Messrs. Schiavone, DiCarolis, and Liguori since they had written virtually identical retraction letters with regard to the subject article. (A copy of my April 28, 1983 letter is attached as Exhibit E to each of plaintiffs' complaints). The letter was written by me on Time Incorporated letterhead and identified my position at that time as Associate Counsel, Magazine Group Law Department, Time Incorporated. I explained in my letter to Messrs. Schiavone, DiCarolis, and Liguori that their letters had been referred to me because the Schiavone Construction Co. and Mr. Schiavone had previously instituted litigation against Time Inc. in the United States Federal District Court for New Jersey as the result of an article which had appeared in Time Magazine. The Complaint in such action (Civil No. 83-932) had named Time, Inc. as a defendant and had described Time, Inc. as "a corporation engaged in the publication of journals throughout the United States and the world including a weekly magazine called 'Time.' " (A copy of the Complaint in such action is attached hereto as Exhibit B.) Prior to the institution of that case, there had been an exchange of correspondence not unlike that in the present case. Initially, Ronald A. Schiavone had written a letter to "Time, Time and Life Building, New York, New York 10020," to which I responded on Time Incorporated letterhead. Ronald A. Schiavone replied to my letter, this time addressing his letter to "Time Incorporated, Time & Life Building, Sixth Avenue & 50th Street, New York, New York 10020." (Copies of such correspondence were attached to plaintiff's Complaint in such action and are attached as such hereto.)

ROBERT P. MARSHALL JR.

(Sworn to September 8, 1983.)

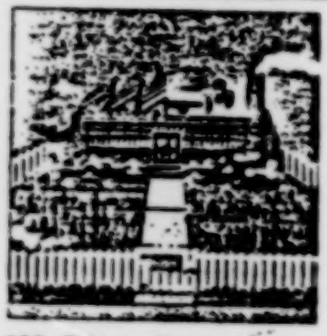
Exhibit A—Annexed to Marshall Appendix.

(See opposite page.)

FORTUNE

Dennis Luzak's oil painting depicts a symbolic handshake and payoff to a corrupt union official. The cover story begins on page 80.

91 Yen



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ACKNOWLEDGMENTS

4—Jill Freedman–Archive. 7—Courtesy International Harvester. 12—Courtesy Playboy, courtesy Koppers. 19—Steve Tarantal. 20—Nancy Moran–Sygma. 73,74—Chartmakers Inc. 77,78—Michael McGinn. 92,96—Jim Cavanagh. 108—Ed Gallucci. 111—Courtesy Kohler Co. 120—William Reduto. 124—Eliot Bergman; frame courtesy Sotheby Parke Bernet Inc. 147—Daniel Pelavin.

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EXHIBIT A

Exhibit A—Annexed to Marshall Appendix

Exhibit B, Annexed to Marshall Affidavit.

CONNELL, FOLEY & GEISER
Attorneys for Plaintiffs
Gateway 1
Newark, New Jersey 07102

(201) 643-2060

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

SCHIAVONE CONSTRUCTION CO. and RONALD A. SCHIAVONE, Individually,

Plaintiffs,

vs.

TIME, INC.,

Defendant.

Civil Action No.

Complaint.

Plaintiff, Schiavone Construction Co. (hereinafter referred to as "SCC") and Ronald A. Schiavone, individually, complaining of the Defendant, say that:

Exhibit B, Annexed to Marshall Affidavit

1. Plaintiff, SCC, is a corporation of the State of New Jersey with its principal office at 1600 Paterson Plank Road, Secaucus, New Jersey, and is and has been at all pertinent times primarily engaged in the business of heavy and highway construction for business entities.

2. Plaintiff Ronald A. Schiavone, residing at Lamington Road, R.D. #1, Whitehouse Station, New Jersey 08889, is a principal shareholder and Chairman of the Board of Directors of SCC and the Company bears his name.

3. Defendant is a corporation engaged in the publication of journals throughout the United States and the world including a weekly magazine called "Time."

4. Commencing in January, 1982, Plaintiffs, to the knowledge of Defendant, were subjects of an investigation by Leon A. Silverman, Special Prosecutor and a Federal Grand Jury sitting in Brooklyn, New York, which investigation primarily concerned the Secretary of Labor of the United States, Raymond J. Donovan.

5. In its issue dated August 23, 1982 Defendant published a certain article, a copy of which is annexed hereto as Exhibit "A". This article contained the following paragraph:

> "The FBI faces some tough questioning of its own. The Senate Labor Committee is investigating the bureau's handling of Donovan's confirmation probe 18 months ago. The personal files of FBI Director William Webster forwarded to the committee last month, reveal that the name of Schiavone appeared several times in the bureau's

Exhibit B, Annexed to Marshall Affidavit

reports on the 1975 disappearance of former Teamster Boss Jimmy Hoffa. That detail would surely have intrigued both the Senate Committee that approved Donovan's nomination in February 1981, and the special prosecutor this year. But neither learned about it until last month."

6. The foregoing quotation was both defamatory and false, to the damage of both Plaintiffs herein.

7. Special Prosecutor, Leon A. Silverman, issued his Supplemental Report dated September 10, 1982 and, at pages 38 and 39 thereof, quoted the memo of December 15, 1980 from William H. Webster, Director of the FBI, to the then Executive Assistant Director of the Bureau to which Defendant, Time, in the offending article, referred, and that memo in pertinent part read as follows:

> "I advised that a company, Chivone (PH), in which he apparently had a very substantial interest, had appeared a number of times in reports in our HOFFEX [*sic:* Hoffex] case, but that none of these suggested any criminality or organized crime associations."

8. Special Prosecutor, Leon A. Silverman, interviewed Director Webster on the subject and reported at page 41 of the Supplemental Report as follows:

> "With respect to the December 15, 1980, memorandum, Director Webster stated that the Hoffex reference is incorrect—that, at the time of the December 12, 1980, communications, the Hoffex files had not been checked. Moreover, the Director stated files had recently been checked and

Exhibit B, Annexed to Marshall Affidavit

> it was determined that there were no references to SCC therein."

9. Under date of November 12, 1982 Plaintiffs wrote to Defendant requesting that Defendant publish Plaintiff's letter of November 12, 1982 as the legal equivalent of retraction of the subject article as well as other defamatory articles published by Defendant and a copy of that letter is annexed hereto as Exhibit "B."

10. Under date of November 30, 1982 Defendant responded advising Plaintiffs that any suggestion that a retraction is in order . . . is inappropriate." A copy of that letter is attached hereto as Exhibit "C."

11. On December 22, 1982 Plaintiffs again wrote to Defendant specifically calling the attention of Defendant to the quoted paragraph in the article of August 23, 1982 and requested retraction and that letter is attached hereto as Exhibit "D."

12. Under date of February 7, 1983 Defendant responded to Plaintiff once again declining to retract and taking the position that ". . . the statement published by Time is totally accurate" and that letter is attached hereto as Exhibit "E."

13. As a consequence of the conscious, deliberate, willful malicious and negligent conduct of Defendant, Plaintiffs have suffered damage to their reputations and the individual Plaintiff, Ronald A. Schiavone, has suffered mental anguish in addition.

WHEREFORE, Plaintiffs demand judgment against Defendant for compensatory and punitive damages.

Exhibit B, Annexed to Marshall Affidavit

DEMAND FOR JURY

Plaintiffs hereby demand a trial by jury as to all issues.

CONNELL, FOLEY & GEISER
Attorneys for Plaintiffs

By THEODORE W. GEISER
Member of the Firm

Dated: March 16, 1983.

Exhibit A to Complaint.

Jury Still Out

Donovan probe is reopened

Only seven weeks ago, when Special Prosecutor Leon Silverman released a 1,025-page report stating that there was "insufficient credible evidence" to prosecute the Labor Secretary, Raymond Donovan quickly declared that his troubles were over. Not quite. Silverman has reopened his investigation, and Time has learned that he will present fresh allegations about Donovan's conduct to grand juries in New York and elsewhere.

Phase II of the inquiry centers on the charge that Donovan, then part owner of New Jersey's Schiavone Construction Co., met near Miami in January 1979 with two known mobsters: William Masselli, a member of the Genovese Mafia family and head of an excavation firm that did business with Schiavone, and Albert ("Chinks") Facchiano, a convicted loan shark and former *capo* (captain) in the Genovese clan. The purpose of the Miami get-together was reportedly to set up no-show jobs for Genovese Mob members on Schiavone construction sites. Although Donovan refused to comment on the new inquiry, he has repeatedly denied meeting with any mobsters. He contends he had run into Masselli only about three times, always at job sites, and says he does not know Facchiano at all.

In the first probe, Silverman received so many reports about Donovan's alleged conferences with mobsters in Miami that Facchiano, one of several gangsters mentioned in the allegations, escaped any questioning. Almost all the others had denied knowing the Labor Secretary, and Silverman says that summoning Facchiano then seemed

Exhibit A to Complaint

pointless. But Facchiano, who is serving time in an Alabama prison for loan sharking, will now be called to testify. Silverman will also attempt to interrogate two men closely connected with Masselli who were not questioned during the first probe: Joseph Verlezza, an associate of Genovese gangsters and Alfred Ditraglia who watches over Masselli's interests in the Miami area, including an oceanfront condominium. During the initial inquiry. Verlezza claimed he was too ill to testify. Ditraglia could not be found by Silverman's staff.

The FBI faces some tough questioning of its own. The Senate Labor Committee is investigating the bureau's handling of Donovan's confirmation probe 18 months ago. The personal files of FBI Director William Webster, forwarded to the committee last month, reveal that the name of Schiavone appeared several times in the bureau's reports on the 1975 disappearance of former Teamster Boss Jimmy Hoffa. That detail would surely have intrigued both the Senate committee that approved Donovan's nomination in February 1981, and the special prosecutor this year. But neither learned about it until last month.

Exhibit B to Complaint.

SCHIAVONE CONSTRUCTION CO.
Constructors & Engineers
1600 Paterson Plank Road
Secaucus, NJ 07094
Phone 201 867-5070 Telex 125978

November 12, 1982

Time
Time and Life Building
New York, New York 10020

Gentlemen:

During the period from December, 1981 to mid-September, 1982 you published a number of defamatory allegations made by others concerning Schiavone Construction Co. As a consequence, the hundreds of people who work for the Company and their families have suffered in the public eye as well as among their friends. The reputation of the Company itself has been severely damaged, and the injury compounded by these reports in your journal.

Given the torrent of slander issuing from protected sources over many months against which we were virtually helpless, the inference of guilt at least to some extent is understandable. The media, through its publishing and republishing of the allegations understandably (indeed in most cases, forgivably) but alas unfortunately, exacerbated our problem. What we now fail to understand, in light of the Silverman reports, is that none of the major media have seen fit to publicly ponder possibility of an orchestrated effort to "get Donovan," even though a careful

reading of the Special Prosecutor's reports grants ample opportunity for such conjecture.

We have no doubt that the accusations made by individuals or leaked from government sources (which subsequently proved to be false) were accurately reported by you. Comprehending the difficulties you must encounter in sorting truth from fiction in such matters of public interest we do not hold you at fault, even though the law in New Jersey has stricter standards. Though innocent, you have been used and we have been thereby abused in the political jeremiad against Ray Donovan, the Secretary of Labor of the United States.

We have always known that the allegations, without exception, have been false, although we have remained substantially silent until now. The Company and all of its people cooperated fully with Special Prosecutor Leon Silverman and a Federal Grand Jury in Brooklyn over these many months, turning over tens of thousands of documents, submitting to a great many interviews and testifying before that Grand Jury whenever requested to do so.

As you know, Mr. Silverman and the unanimous Grand Jury concluded that there was no basis for charging my former partner with any wrongdoing and the same is, of course, true as to the Company and its management.

Another spate of allegations required Mr. Silverman to renew his investigation after June 26, 1982, the date of his first report, and once again the additional allegations were found to be uniformly without merit and the Special Prosecutor so reported on September 13, 1982.

Notwithstanding, the enormous volume of publicity has (quite unfairly) left our Company tainted in the minds of much of the public. In this light we feel it is appropriate for us to call upon you for "retraction," and I have no reason to suppose that you would decline to do so since it

is now clear that there is no truth to the defamatory allegations. However, it would be unrealistic for us to expect you to publish "retractions" upon as broad or frequent a basis as you disseminated the false charges, and even a series of "retractions" published on a wholesale basis would not erase the painful scars. You cannot restore our reputation, but you can and should assist us in our attempts to do so. We appeal to you to enable us, through you, to communicate with our accusers; we are at a monumental disadvantage, since for the most part we cannot even identify (much less "confront") them.

Mr. Silverman has reported that there are "cases of fabrication" and indeed at least two of the accusers have recanted their testimony acknowledging that more than seventeen specific allegations were manufactured out of whole cloth. He has referred these matters to the Attorney General of the United States for appropriate action, but Mr. Silverman, no doubt with proper circumspection, has declined to identify the false witnesses or the particular charges which have been recanted. In many other instances those who made false accusations remain anonymous because they are under some form of government "witness protection" programs. The Silverman Reports attribute certain allegations to "a journalist" and an "ABC TV Producer," but their identities remain unknown to us for reasons which we cannot comprehend.

This leaves us powerless to investigate the provenance of the allegations, and deprived of even a civil remedy against those who have initiated the defamation.

In a few instances, the identify of the informant *has* been disclosed. A civil action for defamation has been commenced in the Federal Court against Mario Montuoro and appropriate action will be taken in due course against the likes of Ralph Picardo, a manifest liar. We seek no redress against those who now tell the truth, but are desirous of publicizing the recantations.

Exhibit B to Complaint

But, as Mr. Silverman has said, there have been a "disturbing number of allegations." This is certainly so, and it would be ingenuous for anyone to suppose that these shadowy figures emerged spontaneously as a consequence of the flurry of publicity given the initial allegations. They were recruited, and we are determined to identify and expose the procurers.

Encouraged by the fact that some have already recanted, we ask that you publish this letter in its entirety in the hope that those who bore false witness or have knowledge of any threats or promises made to them may be willing to help us redeem our good name.

On behalf of myself and Schiavone Construction Co. I beg such persons to communicate with us promptly and I promise that we will cooperate fully with them and with their attorneys to insure so far as humanly possible that they will not be the subject of civil or criminal penalites as a consequence of their disclosures. We have established a team under the supervision of our attorneys to conduct this program. Those having information which may be helpful to us are invited to communicate by writing to P.O. Box 2566, Secaucus, New Jersey. Those hesitant to put their information in writing may simply write and tell us how we may communicate with them and our team will promptly respond.

It may be a forlorn hope that this will inspire decency on the part of false witnesses but we are largely helpless to defend ourselves without further information.

It is a melancholy fact that people generally presume the guilt rather than the innocence of others. Since no charge of criminal conduct has ever been made against us, this is the real measure of our agony. There has been little editorial appreciation of this.*

*for exceptions, see enclosed samples

Exhibit B to Complaint

The final Silverman report was released on September 13, 1982, and I thought it appropriate to allow the passage of a reasonable period of time for the media to pursue the obvious questions, and to permit appropriate action to be taken by Government law enforcement agencies against those who furnished false information. Nothing has happened, but this accounts for my delay in writing this letter.

If you will be good enough to give this letter (excepting this last paragraph if you choose) reasonable prominence in your publication at least once, prior to December 10, 1982, we will be entirely satisfied that such publication would meet any legal requirement under "retraction" and would indeed be as much as we could fairly expect from you under the circumstances.

May we hear from you?

Very truly yours,

RONALD A. SCHIAVONE

RAS:af

Exhibit C to Complaint.

TIME
Incorporated
Magazine Group
Law Department

Time
Life
Fortune
Sports Illustrated
Money
People
Discover

November 30, 1982

Mr. Ronald A. Schiavone
Schiavone Construction Co.
1600 Paterson Plank Road
Secaucus, New Jersey 07094

Dear Mr. Schiavone:

This will acknowledge receipt of your letter of November 12, 1982 to TIME.

TIME Magazine has, in our opinion, responsibly reported on matters relating to Secretary of Labor Donovan and, incidentally, the Schiavone Construction Co., and will continue to do so. We feel that any suggestion that a "retraction" is in order is inappropriate.

You should also be aware that TIME Magazine does not print letters of the length you have submitted and, in any case, does not use its Letters Column for the purpose of private communications to third parties. If, at any time,

you wish to comment on a particular story appearing in TIME Magazine, the editors will be glad to consider for publication a letter of suitable length and of general interest.

If I can be of any assistance, do not hesitate to write to me directly in the future.

Very truly yours,

ROBERT P. MARSHALL JR.
Associate Counsel

RPM/yv

Exhibit D to Complaint.

SCHIAVONE CONSTRUCTION CO.
Constructors & Engineers
1600 Paterson Plank Road
Secaucus, N.J. 07094
Phone 201 867-5070 Telex 125978

December 22, 1982

TIME Incorporated
Time & Life Building
Sixth Avenue & 50th Street
New York, New York 10020

Attention: Robert P. Marshall, Jr.,
Associate Counsel

Dear Mr. Marshall:

I have your letter of November 30, 1982 in which you express the view that TIME Magazine has ". . . responsibly reported on matters relating to Secretary of Labor Donovan and, incidentally, the Schiavone Construction Co. . . ." You further inform me that the TIME Incorporated Magazine Group feels that ". . . any suggestion that a 'retraction' is in order is inappropriate."

I have reviewed most, if not all of the TIME Magazine stories, and I call your particular attention to the articles of December 21, 1981, December 28, 1981, May 10, 1982, June 28, 1982, July 5, 1982 and August 23, 1982. No objective reader could regard those stories as other than defamatory. It is not "responsible" reportage to accurately report false or misleading information, and where the medium itself actively participates in the solicitation of such information, its conduct should be condemned.

Exhibit D to Complaint

A free press is essential to the preservation of our liberties, but the abuse of the power of the press can only lead to the curtailment of that po[illegible]. The TIME stories are clearly oriented against the Secretary of Labor and Schiavone Construction Co. and they are not only repetitive but frequently erroneous. Repetition itself is bad enough, but it is nothing less than malicious when TIME reports in its July 5, 1982 article that it had "learned" certain information (inferentially during the preceding week) when in fact TIME had reported the same material in its issue of December 28, 1981.

In some cases TIME *accurately* but *incompletely* reported *false* information. The following is a quotation from TIME August 23, 1982:

> "The personal files of FBI Director William Webster, forwarded to the committee last month, reveal that the name of Schiavone appeared several times in the bureau's reports on the 1975 disappearance of former Teamster Boss Jimmy Hoffa. That detail would surely have intrigued both the Senate Committee that approved Donovan's nomination in February, 1981, and the special prosecutor this year. But neither learned about it until last month."

In the Supplemental Report of the Special Prosecutor which issued two weeks later, at pages 38 and 39 the December 15, 1980 memo of Mr. Webster is reproduced, and the following is the quotation to which the TIME article obviously refers:

> "I advised that a company, Chivone (PH), in which he apparently had a very substantial interest, had appeared a number of times in reports in our

Exhibit D to Complaint

HOFFEX [*sic:* Hoffex] case, but that none of these suggested any criminality or organized crime associations."

Indeed the Special Prosecutor interviewed Mr. Webster on the subject and reported, at page 41, as follows:

"With respect to the December 15, 1980, memorandum, Director Webster stated that the Hoffex reference is incorrect—that, at the time of the December 12, 1980, communications, the Hoffex files had not been checked. Moreoever, the Director stated files had recently been checked and it was determined that there were no references to SCC therein."

In sum, I think a truly responsible journal would welcome the opportunity to redress injustice in which it had participated and consequently we request appropriate retraction.

Please let me hear from you.

Very truly yours,

RONALD A. SCHIAVONE

RAS:af

Exhibit E to Complaint.

TIME
Incorporated

Magazine Group

Law Department

Time
Life
Fortune
Sports Illustrated
Money
People
Discover

February 7, 1983

Mr. Ronald A. Schiavone
Schiavone Construction Co.
1600 Paterson Plank Road
Secaucus, New Jersey 07094

Dear Mr. Schiavone:

This will belatedly acknowledge receipt of your letter of December 22, 1982. Most of your points are general, and go to what constitutes "responsible" journalism. I strongly disagree with your comments in this respect but respect the expression of your concern.

Regarding the more detailed point of references to Schiavone Construction Co. in the files of FBI Director William Webster, my best information is that the statement published by TIME is totally accurate. Regarding the

Exhibit E to Complaint

later discrepancy reported by the Special Prosecutor, so far as I know nothing has been conclusively established other than that there is a discrepancy. Therefore, I do not consider it appropriate to refer to TIME's coverage of this point as an "injustice in which it had participated."

Very truly yours,

ROBERT P. MARSHALL JR.
Associate Counsel

RPM/yv

Affidavit of Steven M. Gutman in Support of Motion to Dismiss or for Summary Judgment and in the Alternative, for More Definite Statement.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RONALD A. SCHIAVONE,

Plaintiff,

v.

FORTUNE, also known as TIME, INCORPORATED,

Defendant.

Civil Action No. 83-1654 (SA)

Honorable H. Lee Sarokin

State of New York,
County of New York, ss.

STEVEN M. GUTMAN, of full age, being duly sworn according to law, upon his oath, hereby deposes and says:

1. I am the Corporate Operations Manager, Fortune, of the Corporate Manufacturing and Distribution division of Time Incorporated. In that capacity, I am the person

who is responsible for supervising the distribution of copies of Fortune Magazine.

2. I have been employed by Time Incorporated since August 24, 1981.

3. I make this Affidavit in support of Time Incorporated's motion to dismiss plaintiff's complaint or for summary judgment or, in the alternative, for more definite statement.

4. Approximately 646,700 copies of the May 31, 1982 issue of Fortune Magazine were sold in the United States. Of that number, 625,942 copies were subscription copies.

5. Copies of Fortune are always distributed and sold prior to the date appearing on any particular issue. Copies of Fortune will generally reach our subscribers at least two weeks prior to the date appearing on an issue.

6. Subscription copies of the May 31, 1982 issue of Fortune were mailed to subscribers commencing on May 12, 1982. Our records indicate that copies for subscribers in the New York metropolitan area were tendered to the general post office, New York City, at 8:45 a.m. on May 12, 1983, and to the general post office, Philadelphia, on May 13, 1982. See "Fortune Truck Shipments 5/31/82 Issue," which records delivery to various U.S. post offices for mailing, annexed to this Affidavit as Exhibit A.

7. We maintain a national staff of nearly 100 people who report the date upon which they receive their subscription copy of Fortune. The records of this national reporting staff, compiled in a "Fortune Subscriber Delivery Report," indicate that our two New Jersey

"subscriber reporters" received their copies of the May 31, 1982 issue of Fortune on May 14, 1982, while our metropolitan New York subscriber reporters (those who reported) received their copies on May 13, 1982. The "Fortune Subscriber Delivery Report" for the May 31, 1982 issue of Fortune Magazine is annexed to this Affidavit as Exhibit B.

8. Based on information received from our national reporting staff, nearly one-third (28.57%) of our subscribers nationwide received their copies of the May 31, 1982 issue of Fortune on May 13, 1982, and more than one-half (54.76%) received their copies by May 14, 1982. By May 19, 1982, over 94% of our subscribers had received their copies of the May 31, 1982 issue of Fortune. See Exhibit B.

9. Newsstand copies of the May 31, 1982 issue of Fortune were dispatched from our manufacturing site late in the evening of May 9, 1982, as is our regular practice. These copies were on sale beginning May 17, 1982.

10. In addition, a press release was issued on May 11, 1982 in connection with the May 31, 1983 issue of Fortune, and 800 copies of the May 31, 1982 issue of Fortune were mailed to representatives of the domestic press on May 11, 1982.

STEVEN M. GUTMAN

(Sworn to September 7, 1983.)

Notice of Motion to Dismiss Plaintiff's Amended Complaint or for Summary Judgment and, in the Alternative, For More Definite Statement.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RONALD A. SCHIAVONE,

Plaintiff,

v.

FORTUNE, also known as Time, Incorporated,

Defendant.

Civil Action No. 83-1654 (SA)

Honorable H. Lee Sarokin

TO: CONNELL, FOLEY & GEISER, ESQS.
Gateway I
Newark, New Jersey 07102
Attorneys for Plaintiff Ronald A. Schiavone

SIRS:

PLEASE TAKE NOTICE that on October 11, 1983, at 10:00 a.m. in the forenoon, or as soon thereafter as counsel may be heard, the undersigned shall, pursuant to

Notice of Motion to Dismiss Plaintiff's Amended Complaint or for Summary Judgment and, in the Alternative, For More Definite Statement

Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure, apply to the United States District Court, Newark, New Jersey, before the Honorable H. Lee Sarokin, on behalf of Time Incorporated, for an Order dismissing plaintiff's amended complaint for failure to state a claim upon which relief can be granted or for an Order granting summary judgment against plaintiff. Alternatively, the undersigned shall, pursuant to Rule 12(e) of the Federal Rules of Civil Procedure, move for more definite statement.

In support thereof, the undersigned will rely on the pleadings and on the Affidavits of Robert P. Marshall, Jr., Steven M. Gutman, and Donald A. Klein and the Brief filed herewith.

Respectfully submitted,

WINNE, BANTA & RIZZI
Attorneys for Time Incorporated

By: Peter G. Banta

Dated: September 8, 1983

Order (Filed December 9, 1983).

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RONALD A. SCHIAVONE,

Plaintiff,

v.

FORTUNE, also known as Time, Incorporated,

Defendant.

Civil Action No. 83-1654 (SA)

Honorable H. Lee Sarokin

THIS MATTER, having been opened to the Court by Winne, Banta & Rizzi (Peter G. Banta, Esq. appearing), attorneys for Time Incorporated, for an order, pursuant to Fed. R. Civ. P. 12(b)(6) and 56, dismissing plaintiff's complaint, as amended, in the presence of Connell, Foley & Geiser (Theodore W. Geiser, Esq. appearing), attorneys for plaintiff, and the Court having considered the moving papers and the arguments of counsel, and good cause having been shown;

Order (Filed December 9, 1983)

IT IS on this day of December 1983

ORDERED that plaintiff's Complaint, as amended, be and hereby is dismissed.

H. LEE SAROKIN, J.D.C.

Order (Filed December 9, 1983).

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

GENARO LIGUORI,

Plaintiff,

v.

FORTUNE, also known as Time, Incorporated,

Defendant.

Civil Action No. 83-1655 (SA)

Honorable H. Lee Sarokin

THIS MATTER, having been opened to the Court by Winne, Banta & Rizzi (Peter G. Banta, Esq. appearing), attorneys for Time Incorporated, for an order, pursuant to Fed. R. Civ. P. 12(b)(6) and 56, dismissing plaintiff's complaint, as amended, in the presence of Connell, Foley & Geiser (Theodore W. Geiser, Esq. appearing), attorneys for plaintiff, and the Court having considered the moving papers and the arguments of counsel, and good cause having been shown;

Order (Filed December 9, 1983)

IT IS on this 8 day of December, 1983

ORDERED that plaintiffs' Complaint, as amended, be and hereby is dismissed.

H. LEE SAROKIN, J.D.C.

Order—(Filed: Dec. 8, 1983).

UNITED STATES DISTRICT COURT

FOR THE DISTICT OF NEW JERSEY

JOSEPH A. DICAROLIS,

Plaintiff,

v.

FORTUNE, also known as Time, Incorporated,

Defendant.

Civil Action No. 83-1656 (SA)

Hono able H. Lee Sarokin.

THIS MATTER, having been opened to the Court by Winne, Banta & Rizzi (Peter G. Banta, Esq. appearing), attorneys for Time Incorporated, for an order, pursuant to Fed. R. Civ. P. 12(b)(6) and 56, dismissing plaintiff's complaint, as amended, in the presence of Connell, Foley & Geiser (Theodore W. Geiser, Esq. appearing), attorneys for plaintiff, and the Court having considered the moving papers and the arguments of counsel, and good cause having been shown;

Order—(Filed: Dec. 8, 1983)

IT IS on this 8 day of December 1983

ORDERED that plaintiffs' Complaint, as amended, be and hereby is dismissed.

H. LEE SAROKIN, J.D.C.

Affidavit of Theodore W. Geiser, Esq., Dated September 27, 1983.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RONALD A. SCHIAVONE,

Plaintiff,

v.

FORTUNE, also known as Time, Incorporated,

Defendant.

Civil Action No. 83-1654
Motion returnable 10/11/83

JOSEPH A. DiCAROLIS,

Plaintiff,

v.

FORTUNE, also known as Time, Incorporated,

Defendant.

Civil Action No. 83-1656

GENARO LIGUORI,

Plaintiff,

v.

FORTUNE, also known as Time, Incorporated,

Defendant.

Civil Action No. 83-1655

Affidavit of Theodore W. Geiser, Esq., Dated September 27, 1983

State of New Jersey,
County of Essex, ss.

THEODORE W. GEISER, being duly sworn, according to law, upon his oath, deposes and says:

1. I am a member of the firm of Connell, Foley & Geiser, attorneys for the Plaintiffs in the above captioned matters.

2. I make this Affidavit in opposition to the motions to dismiss Plaintiffs' Complaint by Time Incorporated or for summary judgment and, in the alternative, for more definite statement.

3. On May 9, 1983, the above named Plaintiffs filed the Complaints in this action against Defendant Fortune. Service of process on Fortune was attempted by mail on May 20, 1983 to Corporation Trust Company, 28 W. State Street, Trenton, New Jersey, which is the New Jersey Registered Agent for Time, Incorporated.

4. After a short time elapsed, my office contacted CT Company inquiring why service had not been acknowledged. Thomas Cosma, Esq., of this office was informed that the papers had been forwarded to New York. After the oral argument in the *Schiavone v. Time, Incorporated* case, I spoke with Donald A. Klein, Esq. who stated that the wrong party had been sued and that Time, Incorporated was the proper Defendant. Mr. Klein suggested that the Complaints be amended and Time, Incorporated served, after which Time would argue that the change of Defendants did not relate back to the filing date.

Affidavit of Theodore W. Geiser, Esq., Dated September 27, 1983

5. After additional research, I filed an amendment to the Complaints naming "Fortune, a/k/a Time, Incorporated" as the Defendants. See Exhibit "A" hereto. The amended complaints were served by Certified Mail on July 21, 1983 to the Office Manager of Fortune, a/k/a Time, Incorporated, Time and Life Building, New York, New York and were also served personally upon Fortune a/k/a Time, Inc. on July 20, 1983 upon one Walter Censor, Corporate Law Department, Time, Inc., Time and Life Building, New York , New York.

(Sworn to on September 27, 1983.)

Exhibit A to Geiser Affidavit.

CONNELL, FOLEY & GEISER

ATTORNEYS AT LAW

Suite 1600
Gateway 1
Newark, N.J. 07102
(201) 643-2060

—

Atlantic City Office
1325 Boardwalk at Tennessee
Atlantic City, N.J. 08401
(609) 345-0033

May 20, 1983

Corporation Trust Company
28 West State Street
Trenton, New Jersey 08608

Re: Ronald A. Schiavone vs. Fortune, Civil Action No. 83-1654
Joseph A. DiCarolis vs. Fortune, Civil Action No. 83-1656
Genaro Liguori vs. Fortune, Civil Action No. 83-1655

Gentlemen:

You will please find enclosed herewith the Summonses and Complaints in the above matters, directed to Fortune. As you know, Fortune is a publication of Time, Incor-

Exhibit A to Geiser Affidavit

porated and it is for that reason that we are serving you as the New Jersey registered agent for Time, Incorporated.

We have previously served you as registered agent of Time, Incorporated in connection with the civil Action entitled *Schiavone Construction Co. and Ronald A. Schiavone, Individually, vs. Time, Incorporated,* Civil Action No. 83-932, pending in the United States District Court for the District of New Jersey.

Thank you for your kind attention to this matter.

Very truly yours,

THOMAS S. COSMA

TSC/dp
Enclosures

Exhibit A—Second Amended Complaint.

Connell, Foley & Geiser, Esqs.
Gateway I, Suite 1600
Newark, New Jersey 07102
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE DISTRICT COURT OF NEW JERSEY

RONALD A. SCHIAVONE,

Plaintiff,

vs.

FORTUNE, also known as Time, Incorporated,

Defendant.

Civil Action No. 83-1654 (SA)

Hon. H. Lee Sarokin, U.S.D.J.

Plaintiff, Ronald A. Schiavone, complaining of the defendant says that:

1. Plaintiff is an individual residing at Lamington Road, R.D. #1, Whitehouse Station, New Jersey.

2. At all times hereinafter mentioned, Fortune, also known as Time, Incorporated, was and is a corporation of the State of New York with its registered agent in New Jersey being Corporation Trust Company, 28 West State Street, Trenton, New Jersey 08608.

3. Fortune, also known as Time, Incorporated, maintains its executive offices at the Time and Life Building, Sixth Avenue and 50th Street, New York, New York 10020.

4. Jurisdiction in this matter is founded upon diversity of citizenship with the amount in controversy exceeding $10,000.

5. Defendant is a corporation which is engaged in the issuance and publication of a weekly magazine entitled "Fortune".

6. In its issue dated May 31, 1982 defendant published a story entitled "The Charges Against Reagan's Labor Secretary" which was the cover story for that issue, and said cover depicted an artist's rendering of plaintiff making an illegal payoff to a labor union official and a copy of that cover is annexed hereto as Exhibit "A." Furthermore, in the same issue, defendant published an artist's depiction of the same happening, a copy of which is annexed hereto as Exhibit "B."

7. At all pertinent times, plaintiff was an officer of Schiavone Construction Co.

8. The text of the story contains the following defamatory and false statements:

One crucial piece of information that Hatch's committee failed to receive was a strike force informant's allegation that Donovan had been present at a lunch in Long Island City, New York, in 1977 when a Schiavone Construction Co. executive passed an envelope containing a $2,000 payoff to Sanzo, the boss of Blasters Local 29. The witness making this charge against Donovan is a half-deaf blaster and ex-convict, Mario Montuoro, who was secretary-treasurer of Sanzo's union until 1978. Montuoro admits, "I was no angel." He has been arrested for heroin possession and for having a pistol in his car, though the second arrest, he says, "was a pinch I took for Sanzo."

As Montuoro tells it, sometime in June 1977 he accompanied Sanzo to a lunch given by the Schiavone Construction Co. at Prudenti's Vicin-o Mare Restaurant in Long Island City. Seated around the table were four top executives of the company: President Ronald A. Schiavone and vice presidents Ray Donovan, Jerry Liguori, and Jose DiCarolis. Near the close of the lunch, Montuoro claims, DiCarolis handed Sanzo an envelope and said: "Hey, Louie, this is a token of our appreciation."

Sanzo stuck the envelope in his pocket. On the way back to the union hall, says Montuoro, Sanzo opened the envelope and counted out 20 $100 bills. "Knowing Louie," Montuoro told Fortune, "there might have been more. But he told me it was $2,000 and he gave me $200. He said, 'I'm going to keep $200 myself and give the rest to Big Sam,' though he probably kept it all."

Montuoro told Fortune that the bribe was given to encourage Sanzo to fight hard to keep the "sandhogs"—as members of the competing Tunnel Workers Union Local 147 are called—from gaining jurisdiction on sections of Schiavone's 63rd Street subway job. Since the sandhogs receive better wages and benefits than the blasters, hiring them would increase Schiavone's labor costs.

A meeting at the Barbizon

Statements by the excitable Montuoro—who made a flurry of TV appearances after he won $2.5 million in the New York State lottery last month—are hard to follow. He tends to begin a story in the middle and then work his way backward and forward. As a result, one of his key assertions has been missed by both law-enforcement authorities and the press. This added point lends credibility to the Prudenti payoff story. Montuoro told Fortune that a week or ten days after the Prudenti lunch he and Sanzo attended a follow-up meeting with Schiavone vice presidents DiCarolis and Liguori in a Schiavone office at the Barbizon Hotel in Manhattan. Richie Fitzsimons, the sandhog president, was present.

Other information that is consistent with Montuoro's account of union corruption on Schiavone jobs came in a letter sent to the FBI just before the news came out that a special prosecutor had been appointed to investigate the alleged payoff at Prudenti's . . .

> . . . But Thomas Puccio, the Abscam prosecutor, who will resign later this month as head of the Organized Crime Strike Force in Brooklyn, considers Montuoro a credible witness. "The things he has told us turned out to be true," says Puccio, whose deputy used Montuoro's testimony in convicting Sanzo.
>
> (See Exhibit "C" hereto)

9. The text of the story also contains the following defamatory statement:

> Two months ago Fortune began looking into the case on its own. The results can be summarized this way: alot more shoes may be about to fall.
>
> "Big Sam's Friendly Union
>
> Schiavone's subway projects in New York also brought it within reach of another feared Mafia character, "Big Sam" Cavalieri, a power in the Lucchese crime family and "godfather" of Local 29, of the Blasters, Drillrunners and Miners Union. For unscrupulous contractors, Local 29 was a pleasure to do business with because it specialized in selling cheap union labor. Virtually any contractor could walk into the Blasters' office and cut a deal—under some formula whereby the local's officers and their Mafia overlords shared in the savings.
>
> Since it started building subway tunnels in New York City, Schiavone has been the largest employer of Local 29's 400 members."

10. The article contains the following defamatory headlines and picture captions:

"The charges against Reagan's Labor Secretary"

"The payoff charges against Reagan's Labor Secretary"

"A fortune investigation of allegations against Raymond J. Donovan suggests that other shoes are about to drop"

"Two who talked"

"For unscupulous contractors, Local 29 was a pleasure to do business with"

"The bribable boss of the blasters"

11. The aforestated text of the story, taken together with the artist's renderings and captions, and photographs, taken as a whole, is defamatory and false to the damage of plaintiff.

12. On April 13, 1983 plaintiff wrote to defendant demanding a retraction and a copy of that letter is attached hereto as Exhibit "D", asserting that the story is written in a fashion which would lead the average reader of ordinary intelligence to conclude that the material was substantially true.

13. Under date of April 28, 1983 defendant refused to retract by letter to plaintiff bearing that date and a copy of that letter is attached hereto as Exhibit "E".

14. In its letter refusing to retract, defendant, referring to reports of a Special Prosecutor appointed pursuant to the provisions of the Ethics in Government Act said that "The editors of Fortune do not feel, and as a lawyer I agree with them, that the reports of the Special Prosecutor contain a conclusive finding of fact as to either the truth or falsity of [the] allegation."

15. The following is a quotation from page 14 of the findings of the Special Prosecutor issued and dated June 25, 1982:

> "The Special Prosecutor concludes that no credible evidence exists that a luncheon as alleged by Montuoro ever occurred."

16. The conduct of defendant in publishing the defamatory statements, photographs and artist's renderings was negligent, conscious, wilful, malicious and deliberate, as a consequence of which plaintiff has suffered damage to his reputation as well as mental anguish.

WHEREFORE, plaintiff demands judgment against defendant for compensatory and punitive damages.

DEMAND FOR JURY

Plaintiff hereby demands a trial by jury as to all issues.

Dated: December 5, 1983

CONNELL, FOLEY & GEISER, ESQS.
Attorneys for Plaintiff
By: Theodore W. Geiser
A Member of the Firm

(Exhibits A through E are printed herein at pp. to .)

Notice of Appeal—(Filed: January 13, 1984).

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RONALD A. SCHIAVONE,

Plaintiff,

vs.

FORTUNE, also known as Time, Incorporated,

Defendant.

Civil Action No. 83-1654 (SA)

Notice is Hereby Given that Ronald A. Schiavone, plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order entered in this action on the 13th day of December, 1983, dismissing the Complaint in the above matter for the reasons stated in the Court's Opinions filed November 30, 1983 and, on motion for reconsideration, on January 12, 1984.

Notice of Appeal—(Filed: January 13, 1984)

Dated: January 13, 1984

CONNELL, FOLEY & GEISER, ESQS.
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(201) 643-2060
By: Thomas S. Costa
A Member of the Firm

Stipulation Consolidating Appeals.

Connell, Foley & Geiser, Esqs.
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Attorneys for Plaintiffs-Appellants

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

RONALD A. SCHIAVONE,
Plaintiff-Appellant,

vs.

FORTUNE, also known as Time, Incorporated,
Defendant-Respondent.

Docket No. 84-5029

GENARO LIGUORI,
Plaintiff-Appellant,

vs.

FORTUNE, also known as Time, Incorporated,
Defendant-Respondent.

Docket No. 84-5030

Stipulation Consolidating Appeals

JOSEPH A. DICAROLIS,
Plaintiff-Appellant,

vs.

FORTUNE, also known as Time, Incorporated,
Defendant-Respondent.

Docket No. 84-5031

The undersigned, as counsel to the above-named parties in the three captioned appeals, hereby stipulate and agree, pursuant to *F.R.A.P.* 3(b), that the same be and hereby are consolidated for the purposes of briefing, argument and decision by the Court.

Dated: March 2, 1984

CONNELL, FOLEY & GEISER, ESQS.
Attorneys for Plaintiffs-Appellants,
Ronald A. Schiavone, Genaro Liguori
and Joseph A. DiCarolis
By: Theodore W. Geiser
A Member of the Firm

Dated: March 6, 1984

WINNE, BANTA & RIZZI, ESQS.
Attorneys for Defendant-Respondent,
Fortune, also known as Time,
Incorporated
By: Donald A. Klein

So Ordered:

_____

Stipulation Consolidating Appeals

Order

Motion Granted.
For the Court.

M. ELIZABETH FERGUSON
Acting Clerk

PETITIONER'S

BRIEF

NO. 84-1839

Supreme Court, U.S.
FILED
NOV 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RONALD A. SCHIAVONE, GENARO LIGUORI and JOSEPH A. DiCAROLIS,

Petitioners,

vs.

FORTUNE, also known as TIME, INCORPORATED,

Respondent.

On Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

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On the Brief

Adams Press Corp., 1188 Raymond Boulevard, Newark, New Jersey 07102—(201) 623-8611

BEST AVAILABLE COPY

Questions Presented

1. Whether an amendment to correct misnomer of the defendant relates back under Rule 15(c), where the defendant to be brought in was notified of the action, four days after the Statute of Limitations had expired, by timely service upon it of the process issued in the name used for the defendant in the complaint?

2. Did institution of an action designating a corporation's trade name (also a corporate division) as defendant, timely filed and served, provide such notice of the litigation to the corporate defendant as to satisfy Rule 15(c)?

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NO. 84-1839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RONALD A. SCHIAVONE, GENARO LIGUORI and JOSEPH A. DiCAROLIS,

Petitioners,

vs.

FORTUNE, also known as TIME, INCORPORATED,

Respondent.

On Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

Opinion Below

The judgment below of the United States Court of Appeals for the Third Circuit was entered on December 10, 1984 based on an Opinion reported at 750 F.2d 15 (3d Cir. 1984). (Pet. for Cert. Appendix A). An application of the Petitioners for a rehearing en banc was denied by Order dated February 13, 1985. (Pet. for Cert. Appendix C).

Jurisdiction

The Judgment of the Third Circuit Court of Appeals, entered on February 13, 1985, was certified by the U.S. Supreme Court, exercising its jurisdiction under 28 U.S.C. §1254(1).

Federal Rules Involved

F. R. Civ. P. 15(c) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any

> agency or officer thereof to be brought into the action as a defendant.

F. R. Civ. P. 4(j) states in its entirety:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

Statement of the Case

The facts presented on Respondent's Fed. R. Civ. P. 12(b)(6) motion were undisputed. Petitioners alleged that they were libelled in a cover story entitled "The Charges Against Reagan's Labor Secretary" which appeared in the May 31, 1982 issue of Fortune magazine. Complaints against "Fortune" were filed by the Petitioners on May 9, 1983. Substantial distribution of that issue of Fortune was held to have occurred on May 19, 1982. The New Jersey statute of limitations for libel (one year) expired on May 19, 1983.

On May 20, 1983, Petitioners served "Fortune" by mailing the complaints to the New Jersey registered agent for Time, Inc. Fortune is a trademark and an internal division of Time, Inc., but has no other separate legal identity.

Time, Inc. received the complaints on May 23, 1983 but refused to accept service because the party named was not spelled "Time, Inc."

On July 19, 1983, Petitioner amended the complaints to name the defendant as "Fortune, also known as Time, Incorporated." The amended complaints were served by certified mail on July 21, 1983. The District Court granted Time's motion to dismiss, based upon the statute of limitations defense, and held that the amended complaints did not relate back to the original filing date because Time had received notice of the institution of the action after May 19, 1983.

In its Opinion affirming the dismissal, the Third Circuit held:

> (a) under Fed. R. Civ. P. 15(c), regarding when an amended complaint shall relate back to the original filing date, notice of the institution of the action must actually be received by the defendant within the calendar period of the applicable statute of limitations. The Court rejected the principle, established by the Second Circuit in *Ingram* v. *Kumar*, 585 F.2d 566 (1978), *cert. den.* 440 U.S. 940 (1979), that notice "within the period provided by law for commencing the action" includes the time penumbra after filing of the complaint, permitted for service of process; and
>
> (b) that no exception to the Court's reading of rule 15(c) should be created where there is an identity of interest between the intended defendant and the defendant named in the complaint.

Summary of Argument

I

The Supreme Court Advisory Committee proposed and advocated the 1966 amendment of Rule 15(c) for the express purpose of allowing relation back of amendments changing the name or identity of the defendant, under the precise circumstances of the instant case, namely notice to the defendant to be brought in, after the limitations period had expired, but within the time allowed by Rule 4 for timely service upon the original defendant, after a timely complaint. Four District Court cases, involving citizen review of Federal administrative action, had been dismissed, because the wrong officer or agency had been named, although the government had been notified by timely service, albeit after the Statute of Limitations had run. Harvard Professor Byse criticized this outcome in a Law Review article. Citing the article, the Advisory Committee commentary squarely targeted the amended Rule 15(c) to allow relation back of party changes, under the circumstances of the District Court cases, which match the instant case.

As the history and specific goals of the Advisory Committee receded into history, Courts of Appeals divided between an overliteral reading of Rule 15(c), denying relation back where notice to the party to be brought in came after the limitations period had expired, and the other Courts of Appeal, which hewed to the expressed goal of amended Rule 15(c), eschewed a double standard of notice to the original defendant and the new defendant, and held that notice after the limitations period which was timely for the one was sufficient for the other.

The Court of Appeals below sided with the first group. It should be reversed.

It is inherent, and mandated by Rule 1, that Rules of Procedure should be applied and construed to yield just determinations, i.e., on the merits, especially when this fulfills the express purposes of the Rules draftsmen. Procedural double standards are inherently invidious. There is no policy reason to bar relation back for late notice to a new defendant when the very same notice to the original defendant would be timely. Nor would any purpose of statutes of limitations be advanced thereby.

II

A literal interpretation of Rule 15(c) violates the intent of the rules more egregiously where the original party and the party sought to be substituted have such commonality of interest that notice to one is in fact notice to the other.

Under such circumstances, to require actual notice within the limitations period is illogical and disregards the purpose of statutes of limitations. Since a party may not repose where an action is timely commenced but served beyond the confines of the applicable limitations statute, neither should that party escape the consequences of his acts where initial identification is perfect, unmistakeable, free from all doubt and instantly recognized by both the party and the world.

Thus, where the intended defendant is misdesignated in form only, knows or reasonably should know it was the true target and receives the same actual notice it would have received had the form been flawless, relation back should be a foregone conclusion.

ARGUMENT

POINT I

Rule 15(c), construed according to its history and with fidelity to the Cannon to apply procedure to deliver justice on the merits, requires reversal of the result below.

A. The history, method and objectives of F. R. Civ. P. 15(c).

The Rule was installed to ameliorate a literal, and consequently rigid, application of federal or state limitations periods to both claim and party amendments. The Rule was thus a discrete implementation of the overridng Federal policy favoring adjudication on the merits, which was expressed in Rules 1 and 8(f) (Rules and pleadings to be construed to secure the just, i.e. on the merits, determination of every action) and Rule 15(a) (amendments to be allowed freely when justice, i.e., on the merits, so requires). See *Forman* v. *Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962); 3 Moore's *Federal Practice*, Sec. 15.02.

As originally adopted, Rule 15(c) consisted of a single sentence, applied alike to claim and party admendments. That sentence was:

> "(c) *Relation Back of Amendments.*
>
> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

In essence, amendments took the filing date of the original complaint, so long only as the substance of the amendment met the nexus test of the Rule, i.e., that it was sufficiently germane to the earlier pleading. Since party amendments involved no change in subject matter, most federal courts abjured the narrow conception that any variation of parties was automatically a new and different cause of action and, instead, permitted party changes to relate back freely, especially to correct misnomer, involving the wrong name for the right party. 3 Moore's *Federal Practice*, Sec. 15.15(4.-1) and cases cited in n.9; see also Note: *Federal Rule of Civil Procedure*, 15(c): *Relation Back of Amendments*, 57 Minn. L.Rev. 83, 88-90 and cases cited in n.26, n.27 and n.29 (1972).

Against this general course of decision, four District Courts, between 1959 and 1961, dismissed actions to review Federal administrative decisions, because the "wrong" officer was named as defendant and because an amendment to correct the error, after the limitations period had run, was held to be barred by two U.S. Supreme Court decisions of 1920 era, despite Rule 15(c). These events provoked the tempered ire of Harvard Professor Clark Byse, who shortly thereafter published *Suing The Wrong Defendant In Judicial Review Of Federal Administrative Action: Proposals For Reform*, 77 Harv. L. Rev. 40 (1963). Essentially, Prof. Byse favored an amendment of Rule 21 to cover actions against the United States and to allow relation back of amendments to name the correct defendant, where the action was timely brought and service upon a Federal officer was made in accordance with Rule 4(d). Such service follows the filing of a timely complaint and (as in the instant case) may well be accomplished after

the limitations period. Prof. Byse's implicit theme was that notice to the defendant, to be brought in by amendment, warrants relation back if it comes within the time allotted for serving a timely filed complaint, albeit after the limitations period has expired.

The Byse article triggered the 1966 Amendment of Rule 15(c) to add the present second and third sentences. Harvard Professor Benjamin Kaplan, (later Justice of Massachusetts Supreme Judicial Court), was Reporter and, by 1966, a member of the Supreme Court Advisory Committee on Civil Rules. The Committee Report cited the Byse Article and characterized the reasoning and decision of the four District Court cases as "question-begging" and "unjustly" denying relation back and thereby defeating justice on the merits in citizen litigation against the government. The Report continued that private litigation had been handled better, ". . . but incorrect criteria have sometimes been applied, leading sporadically to doubtful results":

> "Rule 15(c) has been amplified to provide a general solution. An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of 'arising out of the conduct * * * set forth * * * in the original pleading', and if, within the applicable limitations period, the party brought in by amendment, first, received such notice of the institution of the action-the notice need not be formal-that he would not be prejudiced in defending the action, and, second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party. Revised Rule

> 15(c) goes on to provide specifically in the government cases that the first and second requirements are satisfied when the government has been notified in the manner there described (see Rule 4(d) (4) and (5)). As applied to the government cases, revised Rule 15(c) further advances the objectives of the 1961 amendment of Rule 25(d) (substitution of public officers)." 3 Moore's *Federal Practice*, Sec. 15.01(9).

The reference to notice to the party brought in by amendment ". . . within the applicable limitations period . . ." plainly referred to a timely filed complaint followed by notice within the period for timely service of that complaint.

Any other reading of the term, ". . . within the applicable limitations period . . ." would have been totally counter-productive of the Committee's objective, namely to allow relation back under the very circumstances of the four District Court cases which denied such relief, i.e., a timely complaint followed thereafter by notice through service timely under Rule 4(d).

This was underscored by the following sentence in the Committe Report quoted above:

> "Revised Rule 15(c) goes on to provide specifically in the government cases that the *first* and *second* requirements are satisfied in the manner there described (see Rule 4(d)(4) and (5)."

The cited first and second requirements, (the second sentence of Rule 15(c)), specify notice ". . . within the applicable limitations period . . ." The nub of the Committee's comment was that, in government cases, notice meets the Rule standards if given within the aggregate period for a timely complaint plus timely service thereafter under Rule 4(d).

Parri passu, the same new benign dispensation was installed for private, as well as government litigation, for the sweep of the Rule 15(c) changes was ". . . to provide a general solution."

Indeed, to accomplish this expansive objective, the Committee Report brought into the orbit of the second sentence proposed for inclusion in Rule 15(c) ". . . an amendment to correct a misnomer or misdescription of a defendant . . ." In these cases the accepted course of decision before 1966 had been to allow relation back with no requirement that the filing of the complaint and notice by service of process must both be compressed into the applicable limitations period. See *Shapiro* v. *Paramount Film Distributing Corp.*, 274 F.2d 743 (3rd Cir. 1960); 3 Moore's *Federal Practice*, Sec. 15-15(4.-1) n.9. To give the Committee's proposal (carried verbatim into Rule 15(c))) a narrower scope in misnomer cases than did the existing practice, would have been so regressive of the Committee's purpose to save the merits, that no such reading can fairly be attributed to the "applicable limitations period" requirement.

Lest this and other objects of the 1966 Rules amendments be misunderstood, Professor Kaplan wrote his own commentary in 81 Harv. L. Rev. 356 (1967), entitled *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure.* He gave Prof. Byse credit for triggering the Rule 15(c) amendment.

Turning to the four District Court cases, which had brought the issue to the fore, Prof. Kaplan noted that there was no issue of timely notice to the correct government officer to be brought in by amendment because ". . . in none of the cases was there any claim of insufficiency of service of process", i.e., process was duly served under Rule 4(d) after a timely filed complaint and reached the officer or agency to be brought in by amendment (coicidentially, the precise sequence and result of the instant case). 81 Harv. L. Rev. at 408, n.195. Focussing squarely upon the District Court cases, Prof. Kaplan said, "The incorrect naming of the defendant should have been treated as an amendable error". 81 Harv. L. Rev. 408.

Passing to the new order, installed by the Rule 15(c) amendment, Prof. Kaplan said:

> "And this should cover cases of misnomer or incorrect selection of private defendants as well; the decisions in this field have been spotty."

What he meant, as applicable to a timely complaint, followed by timely service of process reaching the party to be brought in by amendment shortly after the limitations period expired (the facts of the instant case) was addressed at 81 Harv. L. Rev. at 410. There he said:

> "In Martz v. Miller Bros. Co., 244 F.Supp. 246 (D. Del. 1965), plaintiff filed his action before, but effected service on defendant Miller Brothers Co. after, the running of limitations. Then it was discovered that the proper target of the claim was Miller Brothers Co. "of Newark", a closely affiliated firm. The court thought that, assuming notice of

> the institution of the action is taken to have come to the Newark company when service was made on the company originally named, the revised rule still could not apply because the notice would not have been received 'within the period provided by law for commencing the action' against the Newark company. Yet against the original defendant the action would be considered timely brought despite the delayed service."

It is thus clear that the principal author of the Rule 15(c) amendments would have resolved the "minor difficulty" of a timely filed complaint, followed by timely service, under Rule 4(d), after the limitations period, reaching the very party to be brought in by amendment, by holding that notice to such party, within the period for timely service upon the original defendant, meets the temporal specification for relation back of a party amendment.

The cited article was not the work of the Advisory Committee. But it is unlikely in the highest degree that, as the Committee Reporter, Prof. Kaplan misunderstood the thrust of the Committee goal to save the merits or the technique of the "within the limitations period" requirement, as applied to notice to the party to be brought in by amendment, through service timely made under Rule 4(d), albeit after expiration of the limitations period.

In short had the instant case of misnomer been submitted to the Advisory Committee of 1966 to decide whether their proposed new Rule 15(c) was satisfied, there can be no doubt of a ruling approving relation back of the corrective amendment, given the salient facts: a complaint,

filed within the limitations period, against a defendant named Fortune, Inc., in fact a non-existent entity, followed by the actual delivery of the summons and complaint upon Time, Inc., within four days beyond the limitations period, followed in turn by a motion to amend to name Time, Inc., as the defendant.

While amended Rule 15(c) was still new, its liberalizing mission, to vindicate the merits without prejudice to a defendant brought in by amendment, was routinely fulfilled. See, e.g., *Montalvo* v. *Tower Life Building*, 426 F.2d 1135 (5th Cir. 1970). There the initially named defendant was Tower Building, non-existent entity, replaced with Tower Life Insurance Company by an amendment, which the District Court related back to the filing of the original complaint. The Court of Appeals affirmed.

As time passed and as the Advisory Committee's understanding of the changes accomplished in Rule 15(c) receded into history, Courts of Appeal came to divide, between those who held that the words, requiring notice of the action ". . . within the period provided by law for commencing the action . . .", must be read literally, thereby narrowing relief; while others concluded that the text of Rule 15(c), fairly read, allowed fulfillment of the Committee's twin objectives to let the merits prevail, with no prejudice to the defendant to be brought in by amendment, and allowed relation back where notice to that defendant was accomplished within the same period specified by Rule 4 for timely service upon the original defendant.

The issue in the instant case is whether this latter reading, which is faithful to the spirit of Rule 15(c) and to the Advisory Committee's purposes, should be preferred to a narrow reading of the letter of Rule 15(c), yielding the opposite consequences.

B. The division among the Courts of Appeal and their reasons.

The Courts of Appeal have divided over whether relation back requires that notice of the pending action be given to the party, to be brought in by amendment, before the Statute of Limitations period has expired or whether notice within the additional period allowed for service of process under Rule 4 fits Rule 15(c)?

This state of the authorities was noticed in Justice White's opinion in *Cooper* v. *U.S. Postal Service*, —— U.S. ——, —— S.Ct. ——, 85 L.Ed. 2d 316 (1985), where he dissented from the denial of certiorari. There he said:

> "The petition also challenges the Ninth Circuit's strict reading of Rule 15(c). As that court observed, the Courts of Appeals have not taken a consistent approach to this provision. Some have rejected a literal construction of the requirement that the added party have had notice of institution of the action within 'the period provided by law for commencing the action against him,' allowing, for example, a reasonable time thereafter for service of process. See Kirk v. Cronvich, 629 F2d 404, 408 (CA5 1980); Ingram v. Kumar, 585 F2d 566, 571-572 (CA2 1978), cert denied, 440 US 940, 59 L Ed 2d 499, 99 S Ct 1289 (1979); see also Ringrose v Engelberg Huller Co. 692 F2d 403, 410 (CA6 1982) (Jones, J., concurring). The argument in favor of such a grace period for service of process is appealing when the statute of limitations is as short as 30 days. On the other hand, the Ninth Circuit is hardly alone in requiring that the added defendant

> have had notice strictly within the limitations period. See, eg., Watson v. Unipress, Inc. 733 F2d 1386, 1390 (CA10 1984) explicitly rejecting Ingram, supra); Trace X Chemical, Inc. v. Gulf Oil Chemical Co. 724 F2d 1397, 1400-1401 (CA8 1983); Hughes v. United States, 701 F2d 56, 58-59 (CA7 1981)." (Footnote omitted).

The principal case for the reading of Rule 15(c) to allow what Justice White called " a grace period for service of process," is *Ingram* v. *Kumar*, 585 F.2d 566 (2nd Cir. 1978), cert. den., 440 U.S. 940, 99 S.Ct. 1289, 59 L. Ed. 2d 499 (1979). There the plaintiff brought a medical malpractice action naming Vijaya N. Kumar, a physician, while intending to sue Vijay S. Kumar, actually another doctor. The complaint was filed on December 28, 1976 against Vijaya N. Kumar. While attempting to serve the defendant, Ingram's counsel learned of the error. The correct defendant was served with a copy of the complaint (without any amendment) on May 6, 1977, "several months after the statute of limitations had run," 585 F.2d at 571.

The Second Circuit observed that a literal reading of 15(c) would require notice before the calendar limitations period expired. Such a construction, however, was held to be:

> "... unjustified in jurisdictions where timely service of process can be effected after the statute of limitations has run. In those jurisdictions, even an accurately named defendant may not receive actual notice of the action against him prior to the running of the statute of limitations yet there is no doubt that the action against him is timely commenced.

> There is no reason why a misnamed defendant is entitled to earlier notice that he would have received had the complaint named him correctly." (footnote omitted).

585 F.2d at 571.

The court was then faced with addressing the point where, in a diversity case, state substantive law terminated and federal procedure took over, in determining whether service of process was timely. It concluded that the federal procedure governed, but under a philosophy which preferred the reason of the Rule over its letter:

> "We hold that under Rule 15(c) the period within which 'the party brought in' must receive notice of the action includes the reasonable time allowed under the federal rules for service of process."

585 F.2d at 571-572.

The Fifth Circuit followed *Ingram* v. *Kumar, supra,* without elaborating its reasoning. *Kirk* v. *Cronvich,* 629 F.2d 404, 408 (1980).

In the Seventh Circuit, Judge Jones, concurring in *Ringrose* v. *Engelberg Huller Co., Inc.,* 692 F.2d 403 (1982), marshalled the arguments against what he called the restrictive view of Rule 15(c):

> "I believe that the better view considers as timely notice to parties actually named in the complaint. Original parties quite obviously do not receive notice of the filing of a lawsuit by the filing of the complaint. The rules rejecting the concept of notice by filing in favor of requiring an additional mecha-

nism reasonably calculated to give notice. See Fed. R. Civ. P. 4. The restrictive view of *Simmons* v. *Fenton, supra,* and *Archuleta* v. *Duffy's, supra,* could at times require notice by the party to be added before the party named in the complaint receives notice. See *Ingram* v. *Kumar, supra* at 571. There is no reason to require more expeditious notice to an added party than it would have had if it had been correctly named. Avoidance of this anomalous result may itself be an adequate reason to reject the interpretation which brings it about. *Ingram* v. *Kumar,* 585 F.2d at 571; see generally Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure,* 81 Harv. L. Rev. 356, 410 & n. 204 (1967). As the Supreme Court has often admonished, the rules are not to be given a narrow and formalistic construction. Rather, they should be interpreted according to their function with a view toward allowing a hearing on the merits. See, e.g., *Surowitz* v. *Hilton Hotels Corp.,* 383 U.S. 363, 373, 86 S. Ct. 845, 851, 15 L. Ed. 2d 807 (1966); *Forman* v. *Davis,* 371 U.S. 178, 181-82, 83 S. Ct. 227, 229-30, 9 L. Ed. 2d 222 (1962); *Conley* v. *Gibson,* 355 U.S. 41, 48, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957); see also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321, 334-35, 91 S. Ct. 795, 804-05, 28 L. Ed. 2d 77 (1971). The precept in Rule 15(a) that 'leave to amend shall be freely given when justice so requires' supports such a conclusion. Moreover, a notice rule which accounts for the standard tolling period as part of the 'period provided by law for commencing the action' properly recognizes the intimate connection

between relation back rules and the policy of the statute of limitations. See Notes of the Advisory Committee to Rule 15(c), 39 F.R.D. 82, 83 (1966). If a claim is not stale as to the party originally named, no policy associated with the statute of limitations justifies foreclosing the addition of a party when notice is received within the period provided by the law of statutes of limitations and tolling doctrines. Believing this interpretation both just and in harmony with Rule 15(a) and (c) and the functional approach to pleading requirements, I would adopt it as the law in this Circuit." 692 F.2d at 410.

The opposing point of view, as well expressed in the opinion below as anywhere, is that the text of Rule 15(c) is too clear to allow any leeway, and that, however regrettable, only a *st[illegible]issimi juris* application is possible, even if that yields a double standard of notice, one for the initially named party, which may be given after the limitations period has expired and the other for a party brought in by amendment, who must have notice before the Statute of Limitations runs out. As Chief Judge Seitz expressed the principle:

> "Plaintiffs' argument, as a policy matter, is quite persuasive. It has been adopted as the rule in the second circuit. *Ingram* v. *Kumar,* 585 F.2d 566 (2d Cir. 1978), *cert. denied,* 440 U.S. 940, 99 S. Ct. 1289, 59 L. Ed. 2d 499 (1979). *But see Hughes* v. *United States,* 701 F.2d 56 (7th Cir. 1982).

Defendants respond that the language of the rule is clear and unequivocal, requiring notice within the period 'for commencing the action' and not the period 'for commencing the action plus the time permitted for service of process.' They argue that, since the filing of the complaint arguably provides the named defendant with constructive notice when the action is instituted, the rule is sensible as drafted. Moreover, they argue that it is not proper for a court to amend a rule of procedure whenever it would have drafted a different one.

We read the language of rule 15(c) to be clear and unequivocal, requiring that notice to the defendant occur within the statutory period. While we are sympathetic to plaintiffs' arguments, we agree with the defendant that it is not this court's role to amend procedural rules in accordance with our own policy preferences. We hold, therefore, that the period within which defendant must receive notice under rule 15(c) does not include the time provided for service of process." 750 F.2d at 18.

Thus, the line has been drawn between the view that the Rules are essentially an inflexible structure, to be construed according to letter, even against their expressed overriding purpose to yield justice on the merits, and the other point of view, that the reason and purpose of a Rule should be fulfilled in its application to yield "just" results, i.e., on the merits.

C. The authentic reading of Rule 15(c), faithful to its purpose, allows relation back where the party to be named by an amendment has notice within the time allotted for service after the filing of a timely complaint.

The reasoning of the Court of Appeals below, typical of those Courts which come to the same result, is that the outcome is regettable, but unavoidable because the text of Rule 15(c) constricts any other choice.

The irony of that construction of Rule 15(c) is that it totally belies the explicit purpose of the 1966 Amendments of Rule 15(c). That was to insure against any recurrence of the outcome of four District Court cases, where the wrong Federal officer was named as defendant and relation back was denied. The limitations period involved was 60 days. It is virtually certain that notice to the government came after the short limitations period, but within the penumbra or grace period for later service of process under Rule 4. It was to insure relation back of the amendment to install the correct defendant, under just such circumstances, that Rule 15(c) was amended and enlarged. The Advisory Committee's Report says as much. After citing the four District Court cases, the Report continues:

> "Relation back is intimately connected with the policy of the statute of limitations. The policy of the statute limiting the time for suit against the Secretary of HEW would not have been offended by allowing relation back in the situations described above. For the government was put on notice of the claim within the stated period—in the particular instances, by means of the initial delivery of process to a responsible government official (see Rule 4(d)

(4) and (5). In these circumstances, characterization of the amendment as a new proceeding is not responsive to the reality, but is merely question-begging; and to deny relation back is to defeat unjustly the claimant's opportunity to prove his case. See the full discussion by Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 Harv. L. Rev. 40 (1963); see also Ill. Civ. P. Act § 46(4)." 39 F.R.D. 69; 3 Moore's *Federal Practice*, Sec. 15.01 (9).

Thus, a result exactly opposite to the outcome of the four District Court cases was the Advisory Committee's paradigm for the operation of an amended Rule 15(c). The paradox of the decision of the Third Circuit Court of Appeals below is that relation back was denied, in a setting identical to the four District Court cases, under an amended Rule 15(c), expressly written to accomplish the opposite result.

The thread of every case which sides with the decision below is that the text adopted by the Advisory Committee for the curative amendment of Rule 15(c), if maladroit for its goals, is a defect not remediable by construction, and can only be corrected by a more aptly worded amendment.

To the contrary, there is no cannon for interpretation of the Federal Rules of Civil Procedure which tolerates, much less mandates, a fundamentalist reading of Rules texts. Rule 1 is the first commandment of construction. It is exclusively result oriented. It prescribes that reading which secures a "just", i.e., on the merits, determination

and banishes every other option. This was made resoundingly clear in *Forman* v. *Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962), where the Court said:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the prinicple that purpose of pleading is to facilitate a proper decision on the merits.' Conley v. Gibson, 55 U.S. 41, 48, 2 L. Ed. 2d 80, 86, 78 S. Ct. 99. The Rules themselves provide that they are to be construed 'to secure the just speedy, and inexpensive determination of every action'"

Apart from the text of Rule 15(c), those who support the outcome of the Court of Appeals below assert that a double standard of notice, one for the original defendant and another for the party to be brought in by amendment, is essential to maintain the integrity of the Statute of Limitations. The argument runs thusly: Under Rule 3 the filing of the complaint against the named defendant commences the action and satisfies the Statute of Limitations. Rule 4(j) allows another 120 days for service of process, even if accomplished 119 days after the Statute has run. If this delays timely preparation by the defendant, the prime aim of any limitations period, it is all inexorable, because the cited Rules are too clear for argument. However, an amendment to correct a misnomer, or to replace or to add a party, is very different. Court permission for the amendment is needed and this can and should be used

to defeat the amendment, and thus preclude relation back, unless notice reaches the party to be brought in, before the Statute of Limitations has run, because, for some never articulated reason, it is essential that a new party, unlike the original party, have the running head start of knowing that he is in Court sooner than justice, under the Rules, commands for the original party.

Equality is equity and equal treatment is the presumptive equity, with every inequality or difference in treatment carrying its own heavy burden of justification. There is utterly nothing in the letter or policy of a Statute of Limitations, when administered in a Court, which requires earlier warning to a new defendant as compared with the original defendant. Courts which have adopted that view and have allowed relation back, if the party to be brought in was notified within the period defined for service in Rule 4 (j), characterize the other outcome as "anomalous." It is more; it is arrantly unjust. For it extrapolates a possibly ambivalent term in Rule 15(c) into a cannon of discrimination, which nothing in the history or purpose of Rule 15(c) or the Statutes of Limitations can possibly support.

This would be so even if the instant case involved an amendment replacing or adding a party. In actuality, the amendment was needed to correct a simple misnomer. The complaint identified the defendant as the publisher of the magazine Fortune. The name used was Fortune. There is no such entity and never was. From its first issue, Fortune has been owned and published by Time, Inc. That corporation was notified 4 days after the one year Statute of Limitation had run, when it was served with process directed to the fictitious name Fortune.

The amendment, which the District Court denied, and was affirmed by the Court of Appeals, simply corrected the name of the Fortune publisher from Fortune to Time Inc., without adding, switching or replacing a party, since only a single, real, existing defendant was involved from start to finish.

If the correction sought by the amendment had been to spell a surname correctly, or to use the true given name or to replace a nickname with its more formal counterpart, the case would be no different in principle than the instant change to name the sole existing entity, which publishes Fortune and thus fits the description of the defendant in the original complaint. To block such an amendment, because the news of it came 4 days too late, in the name of a prescript of a Rule of Civil Procedure, undercuts the overriding commandment of Rule 1 to apply procedure to the safe delivery of justice on the merits.

Another argument of those who agree with the result below is that the timeliness of notice to a new defendant would otherwise become an *ad hoc* issue in many cases, to the detriment of the calendar. Given the 1983 amendment of Rule 4(j), 120 days is now the norm for service of process upon the original defendant and is the rule of thumb for every defendant to be brought in by amendment. Indeed, Rule 15(c) has built in protection for prejudice to a replacement defendant, even where notice is given within the 120 days. For under Rule 15(c)(1), such a defendant may show that notice came to him so late that, in fact, he will ". . . be prejudiced in maintaining his defense on the merits, . . ."

In sum, every consideration which favors vindication of the merits, over obstacles deriving from overliteralism in the construction of Rules of Civil Practice, advocates reversal of the decision below.

POINT II

If the Court were to adopt a "literal" reading of Rule 15(c), relation back of amendments should be permitted where the intended defendant (Time, Inc.) has an identity-of-interest with the named defendant (Fortune).

Cases where there exists an "identity-of-interest" between the original and the substituted party are particularly appropriate for a reading of Rule 15(c) in tune with the liberal intention of the book of Rules to yield justice on the merits. Prior to the 1966 amendments, the first sentence of Rule 15(c) (which was not changed) was often employed to find "relation back" where the parties were closely associated in their business activities or jural relation, so that institution of an action against one was bound to give notice to the other. *Shapiro* v. *Paramount Film Distributing Corp.*, 274 F.2d 743, 746 (3rd Cir. 1960).[1]

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[1] Although the commentators agree that the amended portion of Rule 15(c) continues the identity of interest exception, they differ whether the intented party must still receive notice within the statute of limitations period or whether service of process in the normal course after such period will suffice. 6 Wright and Miller, *Federal Practice & Procedure*, §1499 at 521 (1971); *"United States Ex. Rel. Arrow Electronics; Inc. v. G.H. Coffey, Co.*, Judicial Interpretation of Timely Notice under Federal Rule of Civil Procedure 15(c)," 37 *Maine L. Rev.* 153, 163 (1985); Note, "Federal Rule of Civil Procedure 15(c); Relation Back of Amendments," 57 *Minn. L. Rev.* 83, 102, N. 71 (1972); "Federal Rule 15(c)", 50 *Geo. Wash.* L. Rev. 671, 679 (1982).

As Petitioners argue hereinafter, if there is to be an exception to the literal reading of 15(c) accorded identity-of-interest cases, then it simply begs the question to assert that notice must be given within the limitations period.

Notice of an action before the time limits for filing of the complaint may be an appropriate concern for a truly "new" defendant. Rule 15(c) should be read, however, to include such a party if notified or served within the time allowed for service of the originally named defendant where both parties have an identity-of-interest. See 6 Wright & Miller, *Federal Practice & Procedure*, §1499 at 517-518 and 522 (1971); *Note supra*, 57 *Minn. L. Rev.* at 102 (1972), where the author advocates a vicarious notice approach to Rule 15(c).[2]

An explication of the community of interest principle was enunciated by the First Circuit in *Jimenez* v. *Toledo*, 604 F.2d 99, 102 (1st Cir. 1979):

> "The identity of interests concept, a judicial gloss on Rule 15(c)(1), provides that the institution of the action serves as constructive notice of the action to the parties added after the limitations period expired, when the original and added parties are so closely related in business or other activities that it is fair to presume the added parties learned of the institution of the action shortly after it was commenced. . . . The identity of interest principle is often applied where the original and added parties are parent corporation and its wholly owned sub-

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[2] The author there states:

> "Stated another way, an identity of interest indicates that a [new] party will have fair notice of the action and an opportunity to plaintiff's mistake in suing the wrong business. If the business activities are so closely related so as to assure such notice, it is almost certain that Rule 15(c)(1) is satisfied." (Bracket added)

sidiary, two related corporations whose officers, directors, or shareholders are substantially identical and who have similar names or share office space, past and present forms of the same enterprise, or co-executors of an estate.

A close business or jural association between parties weighs not only in determining whether there was a "change of parties" but also (and more importantly in the context of 15(c)) establishes that *institution* of an action against one entity is *notice* of the litigation against its kindred relation. In such circumstances prior to the 1966 revision, "relation back was found to be non-prejudicial" Note, *supra*, 57 *Minn. L. Rev.* at 91.[3] Because the statute of limitations is not frustrated where the named and intended parties are "substantially similar", no justification exists for denying relief under amended Rule 15(c). *Bern-*

[3] Thus, once an action is timely commenced against a party who is served in the normal course, it matters not whether the related party received such notice within the limitations period so long as the related party knew or should have known that but for the mistake in identity he would have been named originally. Cp. *Cooper v. United States Postal Service*,——*U.S.*——, 85 L.Ed.2d 317, 318, n.3 (White, J., dissenting).

The Third Circuit below refused to recognize this exception (750 F.2d at 17-18). The Ninth Circuit (which also follows the Seventh Circuit view) has permitted substitution "when notice of the action's institution was given to another entity with which there was a 'sufficient community of interest.'" and where notice to the original party is given within the applicable limitations period. *Cooper v. U.S. Postal Service, supra*, 740 F. 2d at 717; See *Korn v. Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397, 1400-01 (9th Cir. 1984).

stein v. *Uris Bldg. Corp.*, 50 F.R.D. 121, 122 (S.D.N.Y. 1970).[4]

The majority of cases adopting an "identity-of-interest" exception to Rule 15 present corporate relationships and transactions reflecting common ownership and operations. Thus, the common denominator is found in parent-wholly owned subsidiary (*Travelers Indem. Co.* v. *United States ex. rel. Construction Specialties Co.*, 382 F.2d 103 (10th Cir. 1967)), affiliated corporations (*Bernstein* v. *Uris Builders Corp.*, *supra* and merged or dissolved and successor corporation settings (*Wentz* v. *Alberto Culver Company*, 294 F. Supp. 1327 (D. Mont. 1969)).

Petitioners argued below that a corporate "division" is an *a fortiori* example of identity-of-interest, since it has no legal capacity to be sued but was staffed, owned, operated and had the same principle office as the parent entity, unquestionably satisfying the identity-of-interest test under Rule 15(c). *Montalvo* v. *Tower Life Bulding*, 426 F.2d 1135 (5th Cir. 1970); *Pitman* v. *Anaconda Wire and Cable Company*, 408 F. Supp. 286 (E.D. No. Car. 1976).

"Notice" to related persons or entities under Rule 15(c) invariably injects the inquiry: Has there occurred a change of parties within the intendment of Rule 15(c)? The phrase "misnomer" in this context describes two scenarios. In one, there are two real and distinct but related persons or entities and the plaintiff simply names and serves one, while intending the other. Thus, in *Martz* v. *Miller Bros. Co.*, 244 F. Supp. 246 (D. Del. 1965), the original

[4] The District Court in *Bernstein* found that (1) common officers and directors and (2) identical principal places of business established that "notice to one was notice to the other." 50 F.R.D at 122.

complaint was filed timely, but served three days after the statute ran. The intended defendant, an affiliated firm named "Miller Bros. Co. of Newark", was sought to be substituted. In denying the request, the District of Delaware conceived itself to be a prisoner of an overliteral reading of 15(c), as did the Third Circuit. Recognizing the consequent anomaly, the court commented that under a strict reading, correction of misnomers would fail under circumstances entailing no possible prejudice to the new defendant, with the consequent frustration of the object of the amendment, and suggested a rule change to make the correct reading more evident and more obligatory. 244 F. Supp. at 254, n.21; see also *Wright & Miller, supra,* §1499 at 521.

In the other circumstance, the fact of "misnomer" is beyond cavil. As Chief Judge Feinberg stated in *Ingram, supra,* "the amendment should clearly be allowed under Rule 15(c)" where the error is so obvious or miniscule that it is agreed the *intended* defendant was named and served. 585 F.2d at 570.

> "In most 'misnomer' cases, however, 'the party to be brought in' by the amendment already knows before the amendment about plaintiff's claim and that plaintiff actually intended to assert it against him. For example, the plaintiff names a corporation in the complaint instead of a partnership and serves a partner, or incorrectly spells, in a minor detail, the name of a defendant who is served."

858 F.2d at 570.

Accordingly, a distinction should be made between "misnomers" where the original defendant is the intended defendant but is misnamed or misspelled and is served in a timely fashion, and "changes of parties" where the original defendant sued is *not* the intended defendant but is a completely different person or entity (and thus no identity-of-interest exists) and the intended defendant is later sought to be added after the limitations period has expired. See *Ingram, supra.* Whatever merits may be found to support the view that the notice requirement should also extend to the time for service of process under the *Ingram* facts, it cannot be seriously disputed that, if the second sentence of Rule 15(c) is to apply at all, it cannot apply to defeat a claim where the *intended* defendant has been sued and served in a timely manner, whether initially named as a division, trade name, subsidiary, affiliated entity or other alias.

In *Wentz, supra,* the plaintiff sued the Alberto-Culver Company, an Illinois corporation. The defendant had, however, dissolved the Illinois corporation, and transferred its assets to a Delaware corporation of the same name. Although the complaint was filed timely on January 31, 1966, service of process (and thus notice) did not reach the correct corporation until the statute of limitations had run. The District Court ruled that such a misnomer was governed by the pre-1966 amendment decisional authority interpreting the first sentence of Rule 15(c) and thus it permitted the relation back. *Wentz* has been praised for allowing "a correction in form rather than substance"[5] and chastised for ignoring the Advisory Committee's Note making "misnomers" includible under the amendment. *Id.* at 111-112; *Wright & Miller, supra,* §1499 at 521. Pro-

[5] Note, *supra,* 57 *Minn. L. Rev.* at 111.

fessors Wright and Miller suggest that when a court is faced with the very circumstances that leads to the anomaly exemplified by and lamented in *Martz, supra,* an examination of the facts to determine if the notice policy underlying 15(c) was satisfied is warranted:

> "Of course, the Wentz court was faced with a dilemma and the actual result it reached was desirable. But since Rule 15(c) is based on a notice policy, the court probably should have relied upon the inherent flexibility of the rule. The facts certainly were appealing enough. The new defendant was well aware of the claim within the statutory period. Indeed, it had sent an experienced investigator to discuss the problem with plaintiff and had proposed a possible settlement of the dispute even before the action was commenced Furthermore, although two corporations were involved, there clearly was an identity of interest between the dissolved Illinois corporation and the Delaware corporation so that commencement against one and service on the agents of the other could have been deemed proper commencement against the successor.

Id. at 522.

If, as Time argues, there is a risk of prejudice in construing 15(c) to include the period provided by law for serving the complaint, Time must concede that risk is minimized where the named defendant and the intended defendant are as closely related as Time is to Fortune. Of course, in this appeal, Time cannot assert any prejudice at all. It received as fair a notice of the litigation's institution and as prompt an opportunity to defend as it could have regardless of 15(c)'s existence.

Petitioners in the present action each sent a letter to Fortune dated April 13, 1983 advising Time that they had been libelled in the May 31, 1982 article, requesting a retraction and imposing a deadline of May 1, 1983 for a response (A14a). Time sent a letter from "house counsel" on April 28, 1983 denying the request. Thus Time was fully aware within the one year period that litigation might ensue. Moreover, the facts reveal that Fortune is a "registered mark" and "internal division" of Time, Inc.; its "president, Treasurer and Secretary" are those of Time, Inc. and it maintains its principal office at the Time and Life Building, in New York City. It is difficult to imagine a closer indentity-of-interest case. Finally, service was accomplished on Time Inc.'s registered agent in New Jersey fourteen days after the filing of the complaint and four days after the date of "substantial distribution" of a magazine dated May 31, 1982.

It is an old teaching that the letter killeth where the spirit can fulfill.

The modern goal of all procedure, most explicitly the Federal Civil Rules, is to see justice done on the merits Fed. R. Civ. P. 1. Any outcome which sees the merits jettisoned so that a Rule can be fulfilled according to its letter is presumptively a misreading of the Rule. In the instant case, the acquital of Time of serious charges never addressed on the merits, given that Time was named by one of its widely advertised and promoted monikers, makes the presumption of miscarriage conclusive. This ought not to be allowed by a decision, which would conform the law of the United States to that of three Federal Circuits, slanted in a direction which regressive, in defeating the paramount and universally professed interest in accomplishing justice on the merits.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Third Circuit dismissing petitioners' complaints should be reversed and the matters remanded for further proceedings.

Respectfully submitted,

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Dated: November 21, 1985

RESPONDENT'S

BRIEF

NO. 84-1839

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RONALD A. SCHIAVONE, GENARO LIGUORI and JOSEPH A. DiCAROLIS,

Petitioners,

vs.

FORTUNE, also known as TIME, INCORPORATED,

Respondent.

On Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AND APPENDIX FOR RESPONDENT

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Questions Presented

In addition to the questions identified by petitioners, the following question is presented, as noted in respondent's brief in opposition to the petition for certiorari:

> Assuming *arguendo* that the clear and unequivocal language of Fed. R. Civ. P. 15(c) should be modified for policy reasons, is not any such modification more appropriately the subject of the rule-making, rather than the adjudicative, process?

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NO. 84-1839

IN THE

Supreme Court of the United States

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RONALD A. SCHIAVONE, GENARO LIGUORI and JOSEPH A. DiCAROLIS,

Petitioners,

vs.

FORTUNE, also known as TIME, INCORPORATED,

Respondent.

On Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

Opinions Below

In addition to the opinions and judgments of the Court of Appeals referred to by petitioners, the following opinions and judgments were entered by the District Court in this matter: By an Opinion dated November 30, 1983

(P.Supp.A. 15)* and Orders dated December 8, 1983 (J.A. 96, 98, 100), the District Court dismissed petitioners' complaints. By letter opinion dated January 10, 1984 (R.A. 1), the District Court, in response to petitioners' motion for reconsideration, affirmed its prior ruling. No separate orders were entered.

Statutes Involved

In addition to the Court Rules cited by petitioners, this case involves the following statutes, which are set forth verbatim in the Appendix hereto: 28 U.S.C.A. §331 (West 1982); 28 U.S.C.A. §2071 (West 1982); and 28 U.S.C.A. §2072 (West 1982).

Statement of the Case

Petitioners commenced this libel action by filing separate complaints on May 9, 1983, only a few days before the applicable statute of limitations was to expire (P.A. 3). Contrary to petitioners' Statement of the Case, the Courts below did not hold that substantial distribution of the FORTUNE Magazine article at issue took place *on* May 19, 1982 and that the New Jersey one-year statute of limi-

*"P.A." and "P.Supp.A." references herein are, respectively, references to the Appendix and the Supplemental Appendix filed by petitioners in support of their petition for a writ of certiorari. "R.A." references herein are references to the Appendix filed by respondent in opposition to the petition for a writ of certiorari. "J.A." references herein are references to the Joint Appendix filed by petitioners with their brief on the merits.

tations for libel expired *on* May 19, 1983. Rather, the District Court and the Court of Appeals found it unnecessary to determine the precise date on which the statute of limitations had run, holding that substantial distribution of the issue to newsstands and subscribers* had occurred on May 19, 1982 "at the latest" and that the statute of limitations had run on May 19, 1983 "at the latest" (P.A. 3; P.Supp.A. 19).

Petitioners' complaints named as defendant "FORTUNE" and alleged that "FORTUNE" is a foreign corporation having its principal office at the Time and Life Building (J.A. 8; P.Supp.A. 16-17; P.A. 3). Since "FORTUNE" is not a separate legal entity and lacks capacity to be sued (P.Supp.A. 17; P.A. 4),** petitioners subsequently, on July 19, 1983, filed amended complaints naming as defendant "FORTUNE, also known as TIME, INCORPORATED" (J.A. 25; P.Supp.A. 17).

Petitioners did not attempt to serve their complaints on Time Incorporated "within the period provided by law for commencing" their actions (i.e., within the limitations period), nor did petitioners attempt to give to Time In-

*Subscription copies had been mailed on May 12, 1982 and received by subscribers from May 13 to May 19, 1982. Further, the issue was distributed to newsstands on May 9, 1982 and was on sale on newsstands beginning May 17, 1982 (J.A. 91).

** Like TIME, LIFE, and SPORTS ILLUSTRATED, FORTUNE, a registered mark of Time Incorporated, is the name of a magazine and an internal division of the Time Incorporated Magazine Group staffed by employees of Time Incorporated (P.A. 3; P.Supp.A. 17). Each edition of FORTUNE magazine, moreover, contains on its table of contents page a copyright notice in the name of Time Inc. and a postal notice that FORTUNE is "[i]ssued biweekly by Time Inc.,...." (P.Supp.A. 25).

corporated any other notice of the institution of the action within such period. Not until May 20, 1983 did petitioners' counsel mail the summonses and complaints in these actions to Corporation Trust Company, the registered agent in New Jersey for Time Incorporated, pursuant to Fed. R. Civ. P. 4(e)(2)(C)(ii) (J.A. 33; P.A. 3). Such correspondence was not received by Corporation Trust Company, and Time Incorporated therefore was not afforded notice of the institution of this action, until May 23, 1983 (J.A.34; P.A. 3). Contrary to the allegations in petitioners' complaints, moreover, the May 20, 1983 correspondence from petitioners' counsel not only acknowledged that FORTUNE is published by Time Incorporated but also made reference to a recent litigation in which one of the petitioners, represented by the same counsel as in this case, had correctly named Time Incorporated as defendant. (The litigation to which the correspondence refers is *Schiavone Constr. Co. and Ronald A. Schiavone* v. *Time, Inc.*, 569 F. Supp. 614 (D.N.J. 1983), *rev'd*, 735 F.2d 94 (3d Cir. 1984).

Time Incorporated declined to acknowledge service of petitioners' original complaints, not, as petitioners suggest in their Statement of the Case, because of a mere misspelling, but because Time Incorporated had not been named as a party defendant in petitioners' actions (P.A. 3-4). Even when petitioners filed their amended complaints in July 1983, they did so in a manner calculated to minimize their past error (i.e., naming as defendant "FORTUNE, also known as TIME INCORPORATED") and continued to make allegations concerning "FORTUNE'S" corporate status which petitioners knew or should have known to be erroneous (J.A. 25; P.Supp.A. 17). For this reason, Time Incorporated declined again to acknowledge

service, and petitioners ultimately made personal service of the amended complaints on Time Incorporated.

The District Court dismissed petitioners' complaints on November 30, 1983, holding (i) that petitioners' original actions did not name an entity capable of being sued and that their amendments naming "FORTUNE, also known as TIME, INCORPORATED" did not relate back under Rule 15(c) and were therefore barred by the statute of limitations (P.Supp.A. 17-26), and (ii) that petitioners' complaints were insufficient to state claims upon which relief could be granted (P.Supp.A. 26-29). The District Court noted:

> [T]he federal rule [Rule 15(c)] has anticipated and dealt with the precise situation posed here. If a defendant has been improperly named but receives actual notice of the action before the statute of limitations expires, the complaint may be amended thereafter to cure the deficiency. On the other hand, if such notice is not received until after the period has expired, the deficiency cannot be cured.

(P.Supp.A. 24). The District Court also rejected petitioners' argument that the equities demanded a different result:

> The identity of the publisher of Fortune, namely Time, Inc., was readily ascertainable, indeed from the very magazine in which the defamation allegedly occurred. Undoubtedly there were numerous other available sources to verify and identify the correct defendant.
>
> • • •

> If this result seems harsh, one should remember that plaintiffs created the danger of running afoul of the limitations period by filing the suit close to the end of the period and failing to make service within the period.
>
> • • •
>
> Defendant did nothing which misled plaintiffs.

(P.Supp.A. 24-25). Applying the clear and unequivocal language of Rule 15(c) and determining that the applicable statute of limitations had expired, the District Court concluded that "it would not be appropriate for this court to substitute its own views for that firmly established by the legislature" (P.Supp.A. 26).

In response to petitioners' subsequent motion for reconsideration, the District Court, after hearing oral argument, affirmed its prior ruling, by a letter opinion dated January 10, 1984 (R.A. 1). In that opinion, the Court "adhere[d] to its earlier ruling that the time within which notice must be received by a party to be added under Rule 15(c) does not include a reasonable time for service of process after the limitations period has run" (R.A. 3) and confirmed that, in a diversity action, the Court was bound to follow Rule 15(c) of the Federal Rules of Civil Procedure and not state law (R.A. 4).

The Court of Appeals, having consolidated petitioners' actions, affirmed the District Court's rulings on December 10, 1984 (P.A. 1). In so doing, the Court of Appeals, *inter alia*, rejected petitioners' proffered "identity of interest exception" to Rule 15(c) as having no support in the Rule or in the Advisory Committee's Note to the Rule (P.A. 5-6) and held that the language of Rule 15(c) is

"clear and unequivocal," requiring that notice to defendant of the institution of the action occur within the statute of limitations period (and not such period extended to include a reasonable time for service of process) (P.A. 6-8). Further, the Court of Appeals noted that it was not its role "to amend procedural rules in accordance with our own policy preferences" (P.A. 8).

Petitioners' application for a rehearing was denied by the Court of Appeals *en banc* on February 13, 1985 (P.A. 14).

Summary of Argument

The language of Rule 15(c) is clear and unequivocal. An amendment changing a party relates back only if "within the period provided by law for commencing the action against him," such party has received "notice of the institution of the action." Such notice was not received in this case.

As the Advisory Committee's Note to Rule 15(c) states, "the period provided by law for commencing the action" means "the applicable limitations period." 39 F.R.D. 82, 83 (1966). The history of the 1966 amendment of Rule 15(c) is in accord and does not support petitioners' thesis that such amendment was designed to provide relief to a plaintiff under the circumstances of this case (where notice has not been provided within the limitations period). Petitioners' argument is, in fact, premised upon a complete misreading of the history of Rule 15(c).

The construct placed on Rule 15(c) by certain courts and advocated by petitioners—which would include within the

"period provided by law for commencing the action" a "reasonable" time for service—has absolutely no foundation in the text of Rule 15(c) or the Advisory Committee's Note thereto. Moreover, such a construct undermines the uniformity that Rule 15(c) seeks to achieve.

Rule 15(c) is a federal rule of civil procedure and consequently it, rather than state law, governs the relation back of amendments in a diversity case such as this. Petitioners, having waited until the last minute to file their complaints, failed to meet the express requirements of Rule 15(c): Notice of the institution of petitioners' actions was not received by Time Incorporated "within the period provided by law for commencing the action" (i.e., within the limitations period). The equities, moreover, do not support petitioners' position.

As the Advisory Committee's Note states, Rule 15(c) applies equally to amendments to correct a misnomer and amendments changing a party. 39 F.R.D. 82 (1966). Thus, petitioners' "identity of interest" argument would have relevance only if, because of an identity of interest, Time Incorporated had actually received notice of the institution of the action within the period provided by law for commencing the action against it. In this case, neither "FORTUNE" nor Time Incorporated had such notice.

Finally, the interpretation of Rule 15(c) urged by petitioners would involve an impermissible rewriting of such Rule by this Court. Assuming *arguendo* that there are policy reasons that would support a modification of the language of the Rule, it should not be done on an adjudicative basis; rather, it is properly the subject of the rule-making process, with the concurrence of Congress, under the Rules Enabling Act, 28 U.S.C.A. §2072 (West 1982).

ARGUMENT

I. Fed. R. Civ. P. 15(c) clearly and unequivocally provides that an amendment changing a party relates back only if the defendant received notice of the institution of plaintiff's action "within the period provided by law for commencing the action" (i.e., within the limitations period).

A. Language of Rule 15(c).

Fed. R. Civ. P. 15(c) specifically provides that an amendment changing a party relates back only if

> *within the period provided by law for commencing the action against him,* the party to be brought in by the amendment (1) *has received* such *notice of the institution of the action* that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(Emphasis added). The meaning of the phrase "within the period provided by law for commencing the action" is plain and self-evident; it means within the limitations period. If, as in this case, the party to be brought in by the amendment has received *no* notice of the institution of the action within the limitations period, the amendment does not relate back.

B. History of Rule 15(c).

While the meaning of the phrase "within the period provided by law for commencing the action" is clear, any possible question about its import was dispelled long ago by the Advisory Committee's Note to Rule 15(c), which specifically states that the phrase means "within the applicable limitations period":

> An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of "arising out of the conduct * * * set forth * * * in the original pleading," and if, *within the applicable limitations period,* the party brought in by amendment, first, received such notice of the institution of the action—the notice need not be formal—that he would not be prejudiced in defending the action, and, second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party.

39 F.R.D. at 83. (Emphasis added).* Interpretations of

* While the notice need not be formal, Rule 15(c) requires notice of the actual "institution of the action"—not, as petitioners have argued, notice that an action "might ensue" (P.A.7). *See Craig* v. *United States,* 413 F.2d 854, 858 (9th Cir.), *cert. denied.* 316 U.S. 987 (1969); *Archuleta* v. *Duffy's Inc.,* 471 F.2d 33, 35-36 (10th Cir. 1973); *Martz* v. *Miller Brothers Co.,* 244 F.Supp. 246 (D. Del. 1965); *Bazzano* v. *Rockwell Int'l Corp.,* 439 F. Supp. 1167, 1171 (E.D. Mo. 1977), *rev'd on other grounds,* 579 F.2d 465 (8th Cir. 1978); *Holden* v. *R.J. Reynolds Industries,* 82 F.R.D. 157, 162 (M.D.N.C. 1979); *Tretter* v. *Johns-Manville Corp.,* 88 F.R.D. 329, 331 (E.D. Mo. 1980); *Robbins* v. *Marine Transport Lines, Inc.,* 531 F. Supp. 14, 15 (D.N.J. 1981).

the rules contained in Advisory Committee Notes, such as this, are entitled to considerable weight. *See Mississippi Publishing Corp.* v. *Murphee,* 326 U.S. 438, 444 (1946); 2 J. Moore, *Federal Practice* §1.13[2] (2d ed. 1985); 4 C. Wright & A. Miller, *Federal Practice and Procedure* §1029 (1971 & Supp. 1985).

Faced with the plain language of both Rule 15(c) and the Advisory Committee's Note thereto, petitioners attempt to build an argument that the history of the 1966 amendment of Rule 15(c) mandates a different, contrived reading of Rule 15(c)—one that construes the phrase "within the period provided by law for commencing the action" to mean not solely the applicable limitations period, but rather the applicable limitations period *plus* a "reasonable" time for service. Not only does the history of the 1966 rule change not support petitioners' thesis, but it supports the conclusions reached by both the District Court and the Court of Appeals in their rulings.

Petitioners correctly note that the 1966 amendment of Rule 15(c) resulted from a 1963 Harvard Law Review article by Professor Clark Byse,* which was critical of four recently decided District Court cases, involving relation back issues in suits against government officers.** However, the conclusion that petitioners draw—that the

* C. Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform,* 77 Harv. L. Rev. 40 (1963) (hereinafter "Byse").

** *Cunningham* v. *United States,* 199 F. Supp. 541 (W.D. Mo. 1959); *Sandridge* v. *Folsom,* 200 F.Supp. 25 (M.D. Tenn. 1959); *Hall* v. *Department of Health, Education, and Welfare,* 199 F. Supp. 833 (S.D. Tex. 1960); *Cohn* v. *Federal Security Administration,* 199 F. Supp. 884 (W.D.N.Y. 1961).

District Court cases addressed and the Byse article advocated the "reasonable" time for service rule advanced by petitioners in this case—is entirely without basis.

Each of the four District Court cases involved an appeal from the denial by the Social Security Administration of the Department of Health, Education, and Welfare of benefits under the Social Security Act. While the proper defendant in each case was the Secretary of Health, Education, and Welfare, plaintiffs had erroneously named the United States (*Cunningham*); Marion B. Folsom, Secretary of Health, Education, and Welfare (who had left office nineteen days before plaintiff's complaint was filed) (*Sandridge*); the Department of Health, Education, and Welfare (*Hall*); and the Federal Security Administration (*Cohn*). In each of these cases, in addition to service upon the erroneously named defendant, copies of the summons and complaint had been delivered to the United States Attorney for the district in which the actions were brought and had been sent by mail to the Attorney General of the United States, pursuant to Fed. R. Civ. P. 4(d)(4) and (5). Byse, *supra*, 77 Harv. L. Rev. at 46. Amendments to name the proper defendant were not, however, filed until after the short (60 day) limitations period for these actions had expired.

The issue in each of these cases was whether the amendment to name the proper defendant, made after the limitations period had expired, constituted the commencement of a "new proceeding" so as to preclude relation back. Byse, *supra*, 77 Harv. L. Rev. at 43. The issue was so focused because of the deference paid by the District Courts to two Supreme Court decisions that antedated the adoption in 1938 of the Federal Rules of Civil Procedure and

that held, also in the context of suits against government officers, that the substitution of a "new" defendant after the limitations period constituted the commencement of a "new proceeding" and precluded relation back.*

The question of adding a "reasonable" time for service to the 60 day limitations period was not at issue in the District Court decisions. In fact, both Professor Byse and the Advisory Committee's Note assumed that the government, albeit improperly named, had, in these cases, been put on notice *within* the limitations period. *See* Byse, *supra*, 77 Harv. L. Rev. at 54:

> First, . . . the real defendant is the Government, not the officer who is sued in name only. Second, *when the Government has been notified within the applicable statutory time period* that plaintiff is seeking judicial review, refusal to allow him to bring in the proper defendant serves no useful purpose in any case and results in denial of judicial review in cases in which the statutory time period for bringing the review action has expired.

(Emphasis added). *See also* 39 F.R.D. at 83, wherein the Advisory Committee's Note, discussing the four District Court cases, states:

> Relation back is intimately connected with the policy of the statute of limitations. The policy of the statute limiting the time for suit against the Secretary of HEW would not have been offended by allowing relation back in the situations described above.

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* *Davis* v. *L.L. Cohen & Co.*, 268 U.S. 638 (1925); *Mellon* v. *Arkansas Land & Lumber Co.*, 275 U.S. 460 (1928).

> *For the government was put on notice of the claim within the stated period*—in the particular instances, by means of the initial delivery of process to a responsible government official (see Rule 4(d)(4) and (5)).

(Emphasis added).

The rule reform recommended by Professor Byse was directed essentially to suits against the government or its agencies or officers. In this area, unique problems existed because of particularly short limitations periods, bureaucratic complexity, and the strict construction of statutory waivers of sovereign immunity. *See, e.g.*, 3 J. Moore, *Federal Practice*, §15.15[4.-2] (2d ed. 1985).

In his 1963 Harvard Law Review article, Professor Byse recommended an amendment to Fed. R. Civ. P. 21 (the misjoinder rule)* to remedy the results reached in the District Court cases. His proposed amendment was entitled "Relation Back in Actions Against the United States, Its Agencies or Officers" and read as follows:

> Whenever, in any action against the United States, an agency thereof, or an officer thereof in his official capacity, a copy of the summons and of the complaint shall have been delivered or sent, in compliance or attempted compliance with Rule 4(d)(4) or (5), to the United States attorney for the district in which the action is brought, or to a person designated by him, or to the Attorney General of the United States, or to an agency which or officer who

* Professor Byse recognized that the amendment could equally be made to Rule 15(c). Byse, *supra*, 77 Harv. L. Rev. at 56(n.42).

> would have been a proper defendant, if named, the addition or replacement of a party defendant relates back to the date of the commencement of the action.

Byse, *supra*, 77 Harv. L. Rev. at 55-56. As noted, the rule change recommended by Professor Byse permits relation back where, albeit erroneously, "the Government has been notified within the applicable statutory time period," *id.* at 54, by service of process "upon the United States attorney, the Attorney General of the United States, or an agency or official who would have been a proper defendant if named," *id.* at 58. This aspect of the proposed rule dealt with the problem of bureaucratic complexity. Also, while Rules 4(d)(4) and (5) require, for service of process purposes, both personal delivery and mailing of a summons and complaint to certain specified government officials, the amendment recommended by Professor Byse provided that either would suffice, for relation back purposes, in suits against the government or its agencies or officers if effected within the limitations period. This aspect of the proposed rule dealt with the correlative problem of particularly short limitations periods (i.e., frequently 30 to 60 days).

Professor Byse also recommended a more comprehensive revision of the relation back rules, one that would extend to private litigation as well as to suits against the government or its agencies or officers. While he recognized that "the complexities of drafting an amendment of rule 21 to include both Government and private litigation might unduly delay its revision," 77 Harv. L. Rev. at 56, Professor Byse did submit the following proposed general amendment to be considered in the event of a more comprehensive revision of Rule 21:

Relation Back. Whenever the claim asserted in the action as corrected pursuant to paragraph (a) arose out of the conduct, transaction, or occurrence set forth in the original pleading and the defendant in the action as corrected, *within the period provided by law for commencing the action against him,* (1) *has received* such *notice of its institution* that he would not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that but for a mistake concerning the identity of the proper defendant the plaintiff would have brought the action against him, the correction of the action shall relate back to the date of the commencement of the action if the court finds the relation back to be otherwise fair and reasonable.

Id. at 56 (n.22). (Emphasis added). Professor Byse suggested making this the second parapraph and his proposed amendment concerning suits against the government or its agencies or officers the third parapraph of a revised Rule 21. The more comprehensive provision, applicable to priate litigation, makes clear that in order for there to be relation back, notice must have been *received* "within the period provided by law for commencing the action" (i.e., within the limitations period).

In March 1964, proposed amendments to the Federal Rules of Civil Procedure, drafted by the Advisory Committee on Civil Rules, were submitted to the bench and bar during a one-year comment period. 34 F.R.D. at 329 (1964). Included among the proposed amendments was the following proposed amendment of Rule 15(c), which essentially incorporated the recommendations made by

Professor Byse, both as to suits against the government or its agencies or officers and, more generally, as to private litigations:

> (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. *An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.*
>
> *The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.*

34 F.R.D. at 375 (1964). Under the proposed amendment certain events must take place "within the period provided by law for commencing the action" (i.e., within the limitations period) in order for there to be relation back. In the case of private litigation, notice of the institution of

the action must have been *received* by "the party to be brought in by amendment." *See* authorities cited *infra*, at 29-30. In the case of suits against the government or its agencies or officers, process must have been *delivered or mailed* to "the United States attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named." *See Edwards* v. *United States*, 755 F.2d 1155, 1158 (5th Cir. 1985) (contrasting the requirements of Rules 4(d)(4) and (5) and Rule 15(c) as it relates to suits against the government or its agencies or officers).

One year after the proposed rule amendments were circulated and one year before the revision to Rule 15(c) was adopted, Chief Judge Cabel M. Wright of the United States District Court for the District of Delaware commented on the proposed amendment to Rule 15(c). In *Martz* v. *Miller Brothers Co.*, 244 F. Supp. 246 (D. Del. 1965), as in this case, plaintiff's complaint had been filed just before the statute of limitations was to run, plaintiff named the wrong defendant, and service was not effected on any defendant (whether correctly or incorrectly named) during the limitations period. Discussing the proposed amendment of Rule 15(c), Judge Wright noted:

> Even if the law were as proposed, however, plaintiff's position would not be advanced. As is the case in Delaware, statutes of limitations are frequently geared to the filing of a complaint. The proposed amendment to Rule 15(c) is geared to notice. The rule provides that the party to be substituted must receive notice of the action "within the period provided by law for commencing the action against him."

244 F. Supp. at 254. Judge Wright, in fact, suggested in *Martz* that the proposed rule be amended to add the words "and serving him with notice of the action" after "within the period provided by law for commencing the action against him," 244 F. Supp. at 254(n.21), so as to permit relation back in the situation where the proper defendant had received no notice of the action within the limitations period but the action had been timely filed and service had been effected shortly thereafter.

On February 28, 1966, after *Martz* was decided, the proposed amendments to the Federal Rules of Civil Procedure, including the proposed amendment to Rule 15(c), were transmitted to Congress. 39 F.R.D. 69 (1966). Rule 15(c), as originally proposed in 1964 (34 F.R.D. at 375), became effective on July 1, 1966 (39 F.R.D. 82).

Although it may be assumed that the Advisory Committee, the Supreme Court, and Congress were aware of the comments by Judge Wright in *Martz*,* the modification suggested in the *Martz* opinion was not incorporated in the rule. Thus the phrase "within the period provided by law for commencing the action," although specifically the subject of criticism before the 1966 revision of Rule 15(c), remained intact and unqualified in the revised rule as finally adopted.

Professor Benjamin Kaplan's subsequent comments in a Harvard Law Review article concerning the 1966 rule

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* See *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-97 (1979) (it is appropriate to assume that the legislature, in enacting legislation, knows the law).

amendments* do not, as petitioners suggest, require a different reading of the 1966 amendment of Rule 15(c). Although Professor Kaplan was the Reporter to the Advisory Committee on Civil Rules at the time of the 1966 amendments, he specifically noted at the outset of his 1967 article that the views expressed therein "are entirely personal and have no other status." Kaplan, *supra*, 81 Harv. L. Rev. at 356. This disclaimer is in perfect accord with fundamental principles of statutory construction. See *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 132 (1974) ("Post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage").

More to the point, nothing in Professor Kaplan's article supports the conclusions reached by petitioners. Professor Kaplan's comment concerning the *Martz* case, on which petitioners rely, simply does not support petitioners' surmise that the Advisory Committee would have approved relation back in a case such as *Martz*. As noted, *Martz* was decided before the 1966 amendment of Rule 15(c) and neither the Advisory Committee nor Congress adopted the curative language suggested by Judge Wright in *Martz*. Professor Kaplan refers to *Martz* as exemplary of a "curious but minor difficulty of interpretation" of the language of the rule. Kaplan, *supra*, 81 Harv. L. Rev. at 410. He does not suggest, however, that the Advisory Committee intended that there should be relation back in such a case. Rather, on the page immediately preceding, he summarizes the rationale for the rule change without

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* B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (1), 81 Harv. L. Rev. 356 (1967) (hereinafter "Kaplan").

reference to any addition to the limitations period of a "reasonable" time for service:

> The general rationale finally adopted in revised rule 15(c) is that an amendment changing a defendant relates back when, *within the limitations period*, the party brought in by the amendment, first, has received such notice of the institution of the action that he will not be prejudiced in defending on the merits, and, second, has known or should have known that, had it not been for a mistake of identity, he would have been named in the first place. With respect to government cases, the two conditions are taken to be satisfied by notification through service upon government officials.

Id. at 409-10. (Emphasis added).

Consistent with the plain meaning of the phrase "within the period provided by law for commencing the action" contained in Rule 15(c), the commentators have, like the Advisory Committee's Note, construed this phrase to mean "within the applicable limitations period." *See* 3 J. Moore, *Federal Practice*, §15.15[4.-2], at 15-163 (2d ed. 1985) (discussing the 1966 amendment of Rule 15(c)):

> [T]he Rule demands a showing that, *within the period of limitations*, the new party "has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits" and that he "knew or should have known that, but for a mistake concerning the identity of the proper party," he would have been brought into the proceedings earlier.

(Emphasis added). *See also* 6 C. Wright & A. Miller, *Federal Practice and Procedure* §1498, at 228 (1971 & Supp. 1985):

> In order for an amendment adding a party to relate back under Rule 15(c) *the party to be added must have received notice of the action before the statute of limitations has run.* Otherwise, the deprivation of the new party's right to invoke a statute of limitations defense might raise a question of procedural due process.

(Emphasis added).

As discussed *supra*, the second paragraph of Rule 15(c), relating to actions against the government or its agencies or officers, reflects two minor exceptions to the general rule, both premised on the unique nature of suits involving the government. Contrary to petitioners' argument, this paragraph does not modify the general provisions of the first paragraph of Rule 15(c), which are applicable to private litigations and require that the party to be brought in by amendment receive notice of the institution of plaintiff's action within the limitations period in order for there to be relation back. *See* 3 J. Moore, *Federal Practice* §15.15 [4.-2], at 15-171 (2d ed. 1985):

> The second sentence added to Rule 15(c) by the 1966 amendment refers specifically to actions against officers or agencies of the federal government.
>
> * * *
>
> As the Advisory Committee commented, hardships arising from the mechanical application of the Rules had arisen most acutely in suits by private parties against officers or agencies of the United States, particularly in actions against the Secretary of Health, Education and Welfare, for social security payments, where the claimants' need is often great, the applicable statutes or [sic] limitations relatively short, and choice of the proper individual defendant, who appears only as an official representative, is largely formal. With the potential for technical pleading errors growing along with the size and complexity of the bureaucracy itself, it was important to set up a definite, generous standard for handling relation back of corrective amendments.

Petitioners also contend that the 1966 amendment of Rule 15(c) was intended to "liberalize" relation back and that any reading of the rule that does not result in disposition of a particular case on the merits is inconsistent with Rule 15(c), as amended. This argument begs the question and ignores the underlying purposes of the 1966 amendment.

The Advisory Committee's Note makes clear that the 1966 revision of Rule 15(c) was intended primarily to "clarify" relation back principles—not necessarily to "liberalize" them:

> Rule 15(c) is amplified *to state more clearly* when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall "relate back" to the date of the original pleading.
>
> The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States. * * *

Analysis in terms of "new proceeding" is traceable to *Davis* v. *L.L. Cohen & Co.*, 268 U.S. 638 (1925), and *Mellon* v. *Arkansas Land & Lumber Co.*, 275 U.S. 460 (1928) but those cases antedate the adoption of the Rules which import different criteria for determining when an amendment is to "relate back." As lower courts have continued to rely on the *Davis* and *Mellon* cases despite the contrary intent of the Rules, *clarification of Rule 15(c) is considered advisable.*

• • •

In actions between private parties, the problem of relation back has generally been better handled by the courts, but incorrect criteria have sometimes been applied, *leading sporadically to doubtful results.*

39 F.R.D. at 82-83. (Emphasis added). Professor Kaplan similarly noted that the 1966 amendment to Rule 15(c) was generalized (to include private litigations) because "the decisions in this private field had been spotty." Kaplan, *supra*, 81 Harv. L. Rev. at 409.

The commentators discuss in detail the inconsistencies evident in the application of Rule 15(c) prior to 1966 and the need for definite, albeit not necessarily more liberal, criteria in the 1966 revision. *See* 3 J. Moore, *Federal Practice* §15.15[4.-1] (2d ed. 1985) (since Rule 15(c) was being misapplied in a number of cases, a curative amendment was adopted in 1966 to make it clear that amendments which change the parties to an action can relate back to the date of filing "in certain situations"). *See also* Note, *Federal Rule of Civil Procedure 15(c): Relation Back of Amendments*, 57 Minn. L .Rev. 83, 95-96 (1972) (hereinafter "Note"):*

> Prior to 1966, courts reached differing conclusions on the issue of relation back in seemingly indistinguishable fact situations. This was caused largely by the imprecise standard for decision embodied in the "conduct, transaction, or occurrence" language of the original rule. The Advisory Committee on the Federal Rules suggested more definitive requirements based on standards developed by the better reasoned decisions. *Thus, Rule 15(c) was amended in 1966 in an attempt to establish criteria which would lead to uniformity in the federal courts in the determination of whether an amendment that changes parties after the expiration of the statute of limitations would be allowed to relate back.*
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> • • •
>
> It has been questioned whether the amendment was intended to impose more restrictive requirements or whether Rule 15(c) is now to be regarded as more liberal than the old rule. However, *it is likely that the Advisory Committee never thought in terms of strict or liberal allowance of amendments, but was more concerned with developing precise criteria to establish a sensible test for relation back.*
>
> In any case, the requirements set out in the second sentence of the amended rule are both a clarifica-

* Cited by petitioners at 8, 26, 28 and 31.

> tion of prior law and a compromise with the policies of the statute of limitations. The Advisory Committee amplified Rule 15(c) in the hope of at least rectifying the sporadic results reached by courts due to the application of incorrect criteria. *The Advisory Committee essentially combined the criteria used by some courts prior to 1966 and refined these to accomodate the policies of the statute of limitations.*

(Emphasis added).

The argument by petitioners that reading Rule 15(c) consistently with its plain meaning will result in more restrictive application of relation back principles in misnomer cases* than existed before the 1966 rule change not only misses the point, but it also misconstrues the historic treatment of misnomer cases. Relation back was generally permitted in misnomer cases prior to 1966 not because of any absolute rule but because notice of plaintiff's action was normally received by the misnamed defendant within the limitations period. *See* Note, *supra,* 57 Minn. L. Rev. at 90.

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*A misnomer has been described as an amendment to correct a misdescription of a party intended to be sued. *See, e.g., Martz* v. *Miller Brothers Co.,* 244 F. Supp. 246, 249 (D.Del. 1965). The District Court in this case correctly characterized the distinction between amendments to correct a misnomer and amendments changing a party, however, as "not a clearly defined one" (P.Supp. A. 21).

In any case, Rule 15(c), as amended in 1966, does not distinguish between these two types of amendments. As the Advisory Committee's Note expressly states, both are covered by the Rule. *See* discussion *infra,* at 40-41.

Petitioners' simplistic conclusion that the purpose of the 1966 revision of Rule 15(c) was to insure that all cases be decided on the merits not only ignores the express language of the Rule and the comments of the Advisory Committee, discussed *supra,* but also ignores the balancing reflected in the 1966 amendment. The Advisory Committee's Note is especially cognizant of the impact of the relation back principles contained in the revised rule on the policies of the statute of limitations and expressly states that the policy of the statute limiting the time for suit against the Secretary of Health, Education, and Welfare would not have been offended by allowing relation back, under the amended rule, in the situations involved in the four District Court cases because "the government was put on notice of the claim within the stated [i.e., 60 day] period." 39 F.R.D. at 83.

Professor Byse expressly recognized in his Harvard Law Review article the balancing necessary in any revision of Rule 15(c):

> Long ago Professor Holdsworth noted that one of the most difficult "problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable."

Byse, *supra,* 77 Harv. L. Rev. at 45. The Advisory Committee struck a balance in the 1966 amendment of Rule 15(c) between the policy of fostering litigation on the merits and the policies embodied in statutes of limitations —by establishing specific, uniform criteria for permitting relation back. That balance having been explicitly struck in the Rule, petitioners' references to Fed. R. Civ. P. 1 and to cases, such as *Foman* v. *Davis,* 371 U.S. 178 (1962),

which interpret not Rule 15(c), but the general provisions of Fed. R. Civ. P. 15(a), are clearly misplaced.

> Although the thrust of Rule 15 as a whole is to allow the liberal use of amendments to implement the important federal policy of encouraging litigation on the merits, Rule 15(c) imposes necessary restrictions in deference to the equally important premises of the statute of limitations.

Note, supra, 57 Minn. L. Rev. at 87 (1972). More generally, *see* 4 C. Wright & A. Miller, *Federal Practice and Procedure* §1029, at 129-31 (1971 & Supp. 1985):

> Rule 1 requires the judge to construe the rules liberally to further the cause of justice. However, the judge must exercise his discretion soundly and with restraint because a construction *that ignores the plain wording of a rule* or fails to view it as part of the total procedural system ultimately may prove to be as detrimental to the system as an arbitrary or rigid construction and, in the end, not further the "just, speedy, and inexpensive determination of every action."

(Emphasis added). *See also Healy* v. *Pennsylvania R.R. Co.,* 181 F.2d 934 (3d Cir. 1950), *cert. denied,* 340 U.S. 935 (1951) (just, speedy, and inexpensive litigations are forthcoming only upon adherence to, rather than rejection of, the Rules); *Guilford Nat. Bank* v. *Southern Ry. Co.,* 297 F.2d 921 (4th Cir. 1962) (the Rules may not be expanded by disregarding plainly expressed limitations).

In sum, the history of Rule 15(c) and its amendment in 1966 dictates the conclusion that receipt of notice of the institution of plaintiff's action "within the period provided by law for commencing the action" means what it says

(i.e., receipt of such notice within the applicable limitations period). The artificial construct that petitioners seek to engraft on the rule should be rejected.

C. Construction of Rule 15(c).

Clearly, the majority of courts that have addressed the issue have read Rule 15(c) consistently with its plain meaning. *See* Note, *United States ex rel. Arrow Electronics, Inc.* v. *G.H. Coffey Co.: Judicial Interpretation of Timely Notice Under Federal Rule of Civil Procedure 15(c),* 37 Maine L. Rev. 153 (1985) (recommending this majority view both as a matter of policy and as a matter of internal consistency within the Federal Rules of Civil Procedure). Moreover, courts have been so construing Rule 15(c) since its revision in 1966 (and not, as petitioners speciously urge, since "the Advisory Committee's understanding of the changes accomplished in Rule 15(c) receded into history" (P.B. 14)).

In addition to the decision of the Court of Appeals for the Third Circuit in this case, the Courts of Appeals for the First, Fourth, Seventh, Eight, Ninth, and Tenth Circuits have all required notice to defendant of the institution of plaintiff's action within the limitations period before permitting relation back. *See Hernandez Jimenez* v. *Calero Toledo,* 604 F.2d 99 (1st Cir. 1979); *Weisgal* v. *Smith,* No. 84-6582 (4th Cir. Oct. 16, 1985 (available Dec. 5, 1985, on LEXIS, Genfed library, Circuit file)); *Simmons* v. *Fenton,* 480 F.2d 133 (7th Cir. 1973); *Stewart* v. *United States,* 655 F.2d 741 (7th Cir. 1981); *Hughes* v. *United States,* 701 F.2d 56 (7th Cir. 1983); *Trace X Chemical, Inc.* v. *Gulf Oil Chemical Co.,* 724 F.2d 68 (8th Cir. 1983); *Craig* v. *United States,* 413 F.2d 854 (9th Cir.), *cert. denied,* 316 U.S. 987 (1969); *Cooper* v. *United States Postal Service,* 740 F.2d 714 (9th Cir. 1984), *cert. denied,*

— U.S. —, 85 L. Ed. 2d 316 (1985); *Archuleta* v. *Duffy's Inc.*, 471 F.2d 33 (10th Cir. 1973); *Watson* v. *Unipress, Inc.*, 733 F.2d 1386 (10th Cir. 1984).* Moreover, the majority opinion of the Court of Appeals for the Sixth Circuit in *Ringrose* v. *Engelberg Huller Co., Inc.*, 692 F.2d 403 (6th Cir. 1982) reached the same conclusion. Only the Courts of Appeals for the Second and Fifth Circuits have adopted petitioners' argument that "within the period provided by law for commencing the action" should be construed to mean the limitations period plus a "reasonable" time for service. *See Ingram* v. *Kumar*, 585 F.2d 566 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979); *Kirk* v. *Cronvich*, 629 F.2d 404 (5th Cir. 1980).

The Court of Appeals in this case properly held "the language of rule 15(c) to be clear and unequivocal, requiring that notice to the defendant occur within the statutory period" (P.A. 8). This rationale underlies the majority cases applying Rule 15(c) in circumstances such as this. *See, e.g., Tretter* v. *Johns-Manville Corp.*, 88 F.R.D. at 332:

> This Court must agree with the majority view that notice must be received within the limitations period. The plain language of Rule 15(c) commands such a result. The rule requires notice within the time provided by law for the commencement of the action. An action is "commenced" when suit is filed, not when the defendant is served. See Rule 3, Federal Rules of Civil Procedure. It cannot be gainsaid that the time within which suit must be filed is the limitations period. It is clear, therefore, that the period referred to in Rule 15(c) is the limitations period. The rule does not say the notice must be received within the period provided by law for service on the defendant. To adopt plaintiff's interpretation would be to rewrite the rule to so read.

See also Colonial Mortgage Service Co. v. *Aerenson*, 603 F. Supp. at 329 ("A contrary conclusion would require an interpretation of the rule not justified by its language"). Further, *see Stewart* v. *United States*, 655 F.2d at 742:

> No notice, formal or informal, occurred during the limitations period here. Having elected to file suit on the last day of the limitations period, plaintiff requests us to add to that period a "reasonable time" for service of process. We cannot expand the fully adequate six-month period established by Congress. Moreover, application of Rule 15(c) to the government in the absence of proper notice within the limitations period would result in prejudice by eliminating the statute of limitations defense.

(Citation omitted).

The prinicipal decision relied on by petitioners— *Ingram* v. *Kumar*, 585 F.2d 566 (2d Cir. 1978), *cert. denied*,

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* *Accord Janus* v. *J.M. Barbe Co.*, 57 F.R.D. 539 (N.D. Ohio 1972); *Munetz* v. *Eaton Yale and Towne, Inc.*, 57 F.R.D. 476 (E.D. Pa. 1973); *Bazzano* v. *Rockwell Int'l Corp.*, 439 F. Supp. 1167 (E.D. Mo. 1977), *rev'd on other grounds*, 579 F.2d 465 (8th Cir. 1978); *Magno* v. *Canadian Pacific, Ltd.*, 84 F.R.D. 414 (D. Mass. 1979); *Holden* v. *R J. Reynolds Industries*, 82 F.R.D. 157 (M.D.N.C. 1979); *Tretter* v. *Johns-Manville Corp.*, 88 F.R.D. 329 (E.D. Mo. 1980); *Robbins* v. *Marine Transport Lines, Inc.*, 531 F. Supp. 14 (D.N.J. 1981); *Anastasio* v. *Holiday Inns, Inc.*, 93 F.R.D. 560 (D.N.J. 1982); *Larry* v. *Penn Truck Aids, Inc.*, 94 F.R.D. 708 (E.D. Pa. 1982); *Murray* v. *United States Postal Service*, 550 F. Supp. 1211 (D. Mass. 1982); *Colonial Mortgage Service Co.* v. *Aerenson*, 603 F. Supp. 323 (D. Del. 1985).

440 U.S. 940 (1979)—involved facts far more sympathetic to plaintiff than the facts in this case. In *Ingram*, plaintiff's decedent had been treated in Illinois by a neurosurgeon who subsequently moved to New York. Plaintiff, a resident of Illinois, relied on the New York State Medical Directory to locate the neurosurgeon and named as defendant in the medical malpractice action and served Dr. Vijaya N. Kumar (of Jamestown, New York). It turned out, however, that the physician who had treated plaintiff's decedent was actually Dr. Vijay D. Kumar (of Valhalla, New York). While the sympathetic facts presented in *Ingram* may help to explain the Second Circuit's decision, they do not warrant the Court's disregard of the express language of Rule 15(c).

The *Ingram* decision is premised, in significant part, on the admonition in Rule 15(a) that "leave [to amend] shall be freely given when justice so requires." However, this general admonition addresses pleading practice and not the issue, relevant to this inquiry, that is, whether an amended pleading should relate back for statute of limitations purposes. It is to the specific criteria set forth in Rule 15(c) that a Court must look to determine whether an amendment changing a party relates back.

Underlying the decision in *Ingram* also is the concern that a misnamed defendant should be treated no differently than a properly named defendant. 585 F.2d at 571. However, there are valid reasons for treating such defendants differently, as Rule 15(c) clearly does,* and the distinction is neither anomalous nor unfair, as petitioners suggest.

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* In addition to requiring a misnamed defendant to receive notice of the institution of plaintiff's action within the limitations

(Footnote continued on following page)

The issue addressed by Rule 15(c) is what should be done where there is an amendment changing a party *after the statute of limitations has run.* If petitioners in this case, for example, had not amended their complaints, their original complaints would have been dismissed because the defendant named in such actions lacked capacity to be sued. Petitioners are not in the same position as plaintiffs who have sued a properly named defendant within the limitations period. If they were, there would be no need for Rule 15(c).

As noted *supra,* Rule 15(c) reflects a balancing. Amendments changing a party relate back—but only in certain prescribed situations that are objectively definable. The cornerstone is notice—notice *within the limitations period.* Absent notice to a misnamed defendant, the amendment does not relate back. While in the case of a properly named defendant, timely filing of the action (which provides constructive notice) is sufficient; in the case of a misnamed defendant, actual notice is required.

(Footnote continued from preceding page)

period in order for there to be relation back, Rule 15(c) also treats misnamed and properly named defendants differently with respect to their belief that they were meant to be sued:

> As to an original defendant, the defendant's belief that he was meant to be sued is irrelevant; defendant might believe someone else to be totally responsible for plaintiff's injuries. As to the additional defendant, however, the complaint does not relate back unless the defendant knew or should have known that, but for a mistake, he would have been named as a defendant. See Rule 15(c).

Tretter v. *Johns-Manville Corp.*, 88 F.R.D. at 332. (Footnote omitted).

Rule 15(c), applied in accordance with its clear meaning, preserves the necessary certainty in statutes of limitations. The statute of limitations is not an approximate standard. The flexibile approach taken by *Ingram* "concomitantly erodes the efficacy inherent in establishing fixed periods within which to bring actions." *Holden* v. *R.J. Reynolds Industries,* 82 F.R.D. at 160(n.1). As noted in *Martz* v. *Miller Brothers Co.,* 244 F. Supp. 246, 256 (D. Del. 1965):

> [S]tatutes of limitations are not approximate goals to be aimed at. They cannot be extended willy-nilly by the court as it might extend the time for a brief to be filed. They are rules of law. The court cannot substitute its own assumptions, or notions of fair play, or reluctance to see controversies decided upon technicalities, for the clear mandate of the law.

The statute of limitations applicable in this case was established by state law. As the District Court correctly noted:

> The time for service provided for in the rules cannot extend the statute of limitations as fixed by the New Jersey Legislature. To permit such an extension would result in a federal rule of procedure extending a state established period of limitations.

(P.Supp.A. 24).

Petitioners' argument that notice several days after expiration of the limitations period would do no violence to the statute of limitations or its underlying policies ignores the fundamental nature of such statutes.

See Note, *supra,* 57 Minn. L. Rev. at 85(n.8):

> Necessarily the time period in a statute of limitations will be arbitrary, as it is determined by a state legislature and not by the judicial process. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945). It could be argued that in a given situation the commencement of a suit a few days after the running of a limitations period does not run afoul of any policy of the statute of limitations. Nevertheless, the action will be barred without question by a court.

Moreover, the potential for abuse inherent in the *Ingram* approach is manifest:

> Stretched to its limit, the decision would establish a rule that a party could be added at any time, regardless of his prior knowledge "within the period provided by law for commencing the action against him . . . of the institution of the action . . .," Rule 15(c), so long as he was served within a reasonable time after the limitations period expired. . . . [T]he exclusive focus in *Ingram* is on plaintiff's motives and knowledge, whereas Rule 15(c) clearly states that the defendant's knowledge of the institution of the action is determinative.

Holden v. *R.J. Reynolds Industries,* 82 F.R.D. at 160-61 (n.1). In fact, the "reasonable" period for service referred to in *Ingram* and other cases so construing Rule 15(c) has led to a disparity of result and a distortion of the express provisions of Rule 15(c) that is wholly inappropriate with respect to limitations periods. In *Ingram,* for example, service was not made until *five months* after the expiration of the limitations period, while

in *Davis* v. *Krauss,* 93 F.R.D. 580 (E.D.N.Y. 1982), the Court, following *Ingram,* held that relation back was permissible where the amendment was not served until *ten months and twenty-one days* after the limitations period had expired.

Contrary to petitioners' argument, Fed. R. Civ. P. 4(j), adopted in 1983, does not restore the certainty necessary in this area. Rather than strictly require that service be effected within 120 days, Rule 4(j) authorizes dismissal "without prejudice" of plaintiff's action absent a showing of "good cause why such service was not made within that period." Rule 4(j) therefore permits a court to extend the time for service beyond the 120-day period, and presumably the belated service effected in *Ingram* and *Davis* would still be possible under Rule 4(j). *See also* 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1138 (1971 & Supp. 1985) (noting that the time limit in Rule 4(j) can also be enlarged by the Court pursuant to Fed. R. Civ. P. 6(b)).

The *Ingram* analysis confuses the issue of when an action must be commenced (which is relevant to the notice requirement under Rule 15(c)) and how an action is commenced (which is not relevant to the notice requirement). *See, e.g., Ingram,* 585 F.2d at 571:

> Although on its face the phrase "within the period provided by law for commencing the action against him," seems to mean the applicable statute of limitations period, such a literal interpretation is unjustified in jurisdictions where timely service of process can be effected after the statute of limitations has run. In those jurisdictions, even an accurately named defendant may not secure actual notice of the action against him prior to the running of the statute of limitations. Yet there is no doubt that the action against him is timely commenced.

(Footnote omitted). When an action must be commenced sets an outside limit on the period within which notice of the institution of the action must be received by a misnamed defendant. How an action is commenced (e.g., by filing, by service, etc.) is simply not relevant, as Rule 15(c) does not attempt to equate notice of the institution of an action received by a misnamed defendant with service of a complaint on a properly named defendant.

Finally, the service "artifice" created in *Ingram* in reality most frequently helps the plaintiff who, as in this case, has not been diligent and who has filed his complaint shortly before expiriation of the limitations period. Such a plaintiff proceeds at his own risk, however, and should not have the benefit of a judicial rewriting of a clear and unequivocal rule. As the District Court properly noted:

> If this result seems harsh, one should remember that plaintiffs created the danger of running afoul of the limitations period by filing the suit close to the end of the period and failing to make service within the period. "When filing this close to the deadline, the margin for error is slight. It is axiomatic that when the margin for error is slight, a slight error can be costly." *Tretter* v. *Johns-Manville Corp.,* 88 F.R.D. 329 (E.D. Mo. 1980).

(P.A. 25). *Accord Stewart* v. *United States,* 655 F.2d at 742.

D. Application of Rule 15(c).

Rule 15(c), rather than state law, governs whether an amended pleading relates back for statute of limitations purposes in a diversity case such as this. *See* 3 J. Moore, *Federal Practice* §15.15[4.-2] (2d ed. 1985) (noting that *Hanna* v. *Plumer*, 380 U.S. 460 (1965) is dispositive and that the matter is procedural (not within *Erie* v. *Tompkins*, 304 U.S. 64 (1938)) and one solely of federal practice under Rule 15(c)). In *Hanna*, the Supreme Court stated:

> The Erie rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that Erie commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, Erie commanded the enforcement of state law.
>
> * * *
>
> Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules. * * * To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or

> Congress' attempt to exercise that power in the Enabling Act.

380 U.S. at 470, 473. *See also Britt* v. *Arvantis*, 590 F.2d 57 (3d Cir. 1978) (holding that the New Jersey Supreme Court's interpretation of a New Jersey procedural rule concerning the relation back of amended pleadings is not controlling in a federal diversity action).

Petitioners clearly did not meet the requirements of Rule 15(c). More specifically, Time Incorporated did not received notice of the institution of petitioners' actions within the limitations period.

Petitioners waited to file their complaints until only a few days before the New Jersey one-year statute of limitations for libel was to expire. Petitioners incorrectly named "FORTUNE" as defendant in such actions and did not attempt service on any defendant until May 20, 1983*—11 days later and *after* the statute of limitations had expired. Time Incorporated consequently did not receive notice of the institution of petitioners' actions "within the period provided by law for commencing the action" against it, as required by Rule 15(c).

Petitioners' "equity" argument reduces essentially to the claim that where petitioners are adversely affected by proper application of a rule of civil procedure, the rule should be ignored—or modified. However, proper and uniform application of Rule 15(c) is especially appropriate because of that rule's integral relationship with applicable

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* Under Fed. R. Civ. P. 4(c)(2)(C)(ii), then in effect, petitioners had control over when service was made and were not, for example, subject to the schedules of U.S. marshals, as had been the case before this Rule was amended in 1980.

statutes of limitations and, as the District Court correctly held, the equities did not demand that relief be afforded to petitioners (P.Supp.A. 24-25).

In this case, the identity of the proper defendant (Time Incorporated, the publisher of FORTUNE Magazine) was readily ascertainable by petitioners, "indeed from the very magazine in which the defamation allegedly occurred" (P.Supp.A. 24). Nor did Time Incorporated do anything to mislead petitioners (P.Supp.A. 25). In fact, not only had *Time Incorporated's* counsel responded to petitioners' retraction letter with respect to the article sued on, but petitioners' counsel had referred to Time Incorporated as the publisher of FORTUNE Magazine in its service letter. Also, reference was made in such letter to a recent suit by one of the petitioners, based on an article in TIME Magazine and relating to the same general subject matter, in which Time Incorporated had been correctly named as defendant.

Furthermore, the argument by petitioners that this case involves an amendment to correct a misnomer and not an amendment changing a party is irrelevant as a matter of law. Both the District Court and the Court of Appeals correctly held that it made no difference which characterization was adopted since the Advisory Committee's Note to Rule 15(c) "explains that an amendment to 'correct a misnomer or misdescription of a defendant' changes a party within the meaning of the rule" (P.A. 5-6; P.Supp. A. 22). *See also* 39 F.R.D. at 82:

> Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (*including an amendment to correct a misnomer or misdescription of a defendant*) shall "relate back" to the date of the original pleading.

(Emphasis added).*

• • •

In sum, given the clear and unequivocal language of Rule 15(c) and of the Advisory Committee's Note thereto, as well as the history of the Rule, the Court of Appeals properly held, consistent with the majority rule, that petitioners' amendments did not relate back since Time Incorporated had not received notice of the institution of petitioners' actions within the limitations period—the period provided by law for commencing the actions.

II. "Identity of interest" is relevant only where the incorrectly named defendant has received notice of the institution of the action within the time period prescribed by Rule 15(c).

Petitioners' "identity of interest" argument must be analyzed in light of the relation back criteria established in Rule 15(c). The Court of Appeals correctly characterized this argument by petitioners as nothing more than a restatement of petitioners' general argument that "the period provided by law for commencing the action" included a "reasonable" time for service and properly rejected petitioners' proffered "identity of interest" excep-

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* In fact, *Ingram* v. *Kumar*, the case principally relied on by petitioners, rejects any distinction between an amendment to correct a misnomer and an amendment changing a party. 585 F.2d at 570 (n.7).

tion as lacking support in Rule 15(c) or the Advisory Committee's Note (P.A. 6).

The critical distinction under Rule 15(c) is between (i) the situation where a misdescribed defendant has been served within the limitations period and an amended pleading is subsequently filed and (ii) the situation, as in this case, where a misdescribed defendant has not been served within the limitations period and an amended pleading is subsequently filed. *See* authorities cited *supra*. In the latter case, the amended pleading clearly does not relate back because notice of the institution of the action was not received within the period provided by law for commencing the action.

Identity of interest becomes relevant only where the party ultimately served has an "identity of interest" with an entity that had notice of the institution of the action within the limitations period (which notice can be imputed to the later named defendant). In this case, *neither* FORTUNE nor Time Incorporated had notice of the institution of petitioners' actions within the limitations period, as such notice was not afforded by petitioners until May 23, 1983—after the statute of limitations had run. Consequently, even assuming an identity of interest between FORTUNE and Time Incorporated, petitioners' argument is irrelevant as a matter of law.

The authorities cited by petitioners in support of their "identity of interest" argument generally involved situations in which the related entity received notice of the institution of the action *within the limitations period*, rather than the situation, as in this case, where no such notice was provided within the limitations period. *See*,

e.g. Travelers Indemnity Co. v. *United States*, 382 F.2d 103 (10th Cir. 1967); *Montalvo* v. *Tower Life Buliding*, 426 F.2d 1135 (5th Cir. 1970); *Bernstein* v. *Uris Building Corp.*, 50 F.R.D. 121 (S.D.N.Y. 1970); *Pittman* v. *Anaconda Wire & Cable Co.*, 408 F. Supp. 286 (E.D.N.C. 1976); *Korn* v. *Royal Carribean Cruise Line, Inc.*, 724 F.2d 1397 9th Cir. 1984).*

Petitioners cite Justice White's dissent from the denial of certiorari in *Cooper* v. *United States Postal Service* in support of the proposition that "once an action is timely commenced against a party who is served in the normal course, it matters not whether the related party received such notice within the limitations period so long as the related party knew or should have known that but for the mistake in identity he would have been named originally" (P.B. 28). In fact, Justice White said essentially the opposite:

> In some cases, as where a complaint naming a corporation as the defendant is later amended to add the corporation's owner, e.g., Itel Capital Corp. v. Cups Coal Co., 707 F2d 1253, 1258 (CA11 1983), or parent corporation, e.g., Marks v. Pratteo, Inc., 607 F2d 1153 (CA5 1979), the added party is deemed to have had notice in light of its identity of interests

*While it is not clear from the opinion in *Shapiro* v. *Paramount Film Distributing Corp.*, 274 F.2d 743 (3d Cir. 1960) precisely when notice of the action was received by the correct defendant, it appears that the misnamed defendant was served within the limitations period. Moreover, in *Wentz* v. *Alberto Culver Co.*, 294 F. Supp. 1327 (D. Mont. 1969), relied on by petitioners, the Court, ignoring the Advisory Committee's Note (*see* discussion *supra*, at 40-41), treated a misnomer as an exception to Rule 15(c).

> or close association with the original defendant. See generally Hernandez Jiminez v. Calero Toledo, 604 F2d 99, 102-103 (CA1 1979). *Petitioner's position is somewhat weak in this regard because, while the complaint was filed within the requisite 30 days, no party was served with process within that period.*

85 L. Ed. 2d at 318(n.3). (Emphasis added).

The commentary relied on by petitioners also does not support their "identity of interest" argument. Rather, the commentators note the distinction made herein, based on notice to the related party within the limitations period. *See* 6 C. Wright & A. Miller, *Federal Practice and Procedure* §1499, at 516-17 (1971 & Supp. 1985):

> When the named defendants and the party plaintiff actually intended to sue have an "identity of interest," an amendment adding the proper party will relate back *if the other requirements of Rule 15(c) have been satisfied.*

(Emphasis added). *See also* Note, *supra,* 57 Minn. L. Rev. at 102-106 (which expressly recognizes that absent an amendment to Rule 15(c), notice to a related entity must be provided *within the limitations period*).

In sum, petitioners' "identity of interest" argument rests on the premise that the intended defendant (Time Incorporated) received notice of the institution of the action not within the limitations period but rather within the time allowed for service of process. Given the explicit provisions of Rule 15(c), such argument is insufficient as a matter of law.

III. Assuming *arguendo* that the clear and unequivocal language of Rule 15(c) should be modified for policy reasons, any such modification is properly the subject of the rule-making, not the adjudicative, process.

Essentially, petitioners urge this Court to rewrite Rule 15(c). Ignoring the plain meaning of the Rule—a meaning confirmed in the comment by the Advisory Committee that the phrase "within the period provided by law for commencing the action" means "within the limitations *period,*" 39 F.R.D. at 83—petitioners argue for a contrived, artificial construction of the Rule that has no basis in its history and is flatly at odds with the express language of the Rule.

Not only does petitioners' argument find no support in the language or history of Rule 15(c), but it also finds no support in the commentary. Commentators who have criticized the Rule have recognized, as did Judge Wright in *Martz* v. *Miller Brothers Co.,* 244 F. Supp. 246 (D. Del. 1965), that the result sought by petitioners could be achieved only by rule change—and not by distorting the language of Rule 15(c). *See, e.g.,* Note, *supra,* 57 Minn. L. Rev. at 103-105.

Courts have consistently rejected the *Ingram* approach of rewriting Rule 15(c) as "a judicial extension of the statute of limitations which . . . is beyond the proper role of the courts." *Larry* v. *Penn Truck Aids, Inc.,* 94 F.R.D. 708, 720(n.18) (E.D. Pa. 1982). *See Tretter* v. *Johns-Manville Corp.,* 88 F.R.D. 329, 332 (E.D. Mo. 1980) ("Twisting the language of Rule 15(c) in an attempt to do equity in a particular case is uncalled for"); *Robbins* v. *Marine*

Transport Lines, Inc., 531 F. Supp. 14, 15 (D.N.J. 1981) ("The rule is clear and explicit, and needs no construction or interpretation"). *See also Weisgal* v. *Smith*, No. 84-6582 (4th Cir. Oct. 16, 1985 (available Dec. 5, 1985, on LEXIS, Genfed library, Circuit file)):

> The language of the Rule requires, in plain and clear terms, that the notice be given "within the limitations period." To include "time for service" as an addition to the six-months limit in the Rule in a FTCA action would demand a rewriting of the Rule. It is our responsibility to apply the Rule as it is written, especially when its language is free from doubt or ambiguity, as is this Rule, even though such an application in the rare case might work a harsh result. * * * And this is what the drafters of the Rule intended. Thus in the Notes of the Advisory Committee it is said that the notice must be received "within the applicable limitations period." Advisory Committee Note, paragraph 5, F.R.C.P. 15(c). The application of Rule 15(c) in the absence of proper notice to the United States within the limitations period would result in prejudice by eliminating the statute of limitations defense. * * *

In reaching the conclusion that we have, we are not merely following what we conceive to be the intention of the drafters of the Rule but we are also observing the admonition of the Supreme Court in Baldwin County v. Brown, —— U.S. ——, 80 L. Ed. 2d 196, 202 (1984), wherein the Court said:

> "Procedural requirements established by Congress for gaining access to the federal courts

> are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in Mohasco Corp. v. Silver, 447 US 807, 826, 65 L Ed 2d 532, 100 S Ct 2486 (1980), [I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'"

(Citations omitted). Further, *see Cooper* v. *United States Postal Service*, 740 F.2d at 717:

> We recognize that our literal interpretation of rule 15(c) and the short limitations period established by 42 U.S.C. Sec. 2000e-16(c) combine to produce a seemingly harsh result in this case. Such apparently harsh results in individual cases, however, may be the inevitable corollary of our obligation in all cases to follow precedent and to implement controlling statutes and procedural rules. We may ignore neither the limitations on the filing of Title VII actions contained in section 2000e-16(c) nor the notice requirement for the substitution of parties in amended pleadings established by the plain language of rule 15(c). Whatever hardship these combined provisions work on Title VII plaintiffs can be alleviated only by Congress and the drafters of the Federal Rules of Civil Procedure.

(*Cert. denied*, —— U.S. ——, 85 L.Ed. 2d 316 (1985)).

Both the District Court and the Court of Appeals in the present case correctly believed that rewriting Rule 15(c) was beyond a Court's power. As the District Court noted:

> [I]t would not be appropriate for this court to substitute its own views for that firmly established by the legislature.

(P.Supp.A. 26). The Court of Appeals similarly commented:

> [I]t is not this court's role to amend procedural rules in accordance with our own policy preferences.

(P.A. 8).

The judicial restraint engaged in by the courts below is totally in accord with recurring admonitions from this Court. *See, e.g., Schlagenhauf* v. *Holder,* 379 U.S. 104, 121 (1964) ("The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations"); *Harris* v. *Nelson,* 394 U.S. 286, 298, *reh'g denied,* 394 U.S. 1025 (1969) ("We have no power to rewrite the Rules by judicial interpretations"); *Walker* v. *Armco Steel Corp.,* 446 U.S. 740, 750(n.9) (1980) ("The Federal Rules should be given their plain meaning"). *See also* authorities cited *supra,* at 28.

The reason for these constraints is fundamental. Congress has constitutional power to regulate the practice and procedure of the federal courts and has delegated such power to this Court by the Rules Enabling Act of 1934 (codified as amended at 28 U.S.C.A. §2072 (West 1982)). *See Sibbach* v. *Wilson & Co.,* 312 U.S. 1, 7-10 (1941); *Hanna* v. *Plumer,* 380 U.S. 460, 472 (1965). *See also* 28 U.S.C.A. §2071 (West 1982) (dealing with the rule-making power generally). In delegating this power, however, Congress has retained a review function with respect to the rule-making process. Rules prescribed by

this Court do not take effect until 90 days after they have been reported to Congress. *See* 28 U.S.C.A. §2072 (West 1982). Moreover, Congress has directed that the Judicial Conference play a significant role in the rule-making process:

> The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

28 U.S.C.A. §331 (West 1982).

In sum, the foregoing statutes dictate that rule changes be effected through the rule-making process and not by adjudication in particular cases. This Court should not modify the clear and unequivocal language of Rule 15(c).

CONCLUSION

For the reasons hereinabove set forth, respondent Time Incorporated respectfully requests that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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Dated: December 24, 1985

APPENDIX

28 U.S.C.A. §331 (West 1982)

§331. Judicial Conference of the United States

The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial Conference of the United States. Special sessions of the conference may be called by the Chief Justice at such times and places as he may designate.

The district judge to be summoned from each judicial circuit shall be chosen by the circuit and district judges of the circuit at the annual judicial conference of the circuit held pursuant to section 333 of this title and shall serve as a member of the conference for three successive years, except that in the year following the enactment of this amended section the judges in the first, fourth, seventh, and tenth circuits shall choose a district judge to serve for one year, the judges in the second, fifth, and eighth circuits shall choose a district judge to serve for two years and the judges in the third, sixth, ninth, and District of Columbia circuits shall choose a district judge to serve for three years.

If the chief judge of any circuit or the district judge chosen by the judges of the circuit is unable to attend, the Chief Justice may summon any other circuit or district judge from such circuit. If the chief judge of the Court of Claims, or the chief judge of the Court of Customs and Patent Appeals is unable to attend, the Chief Justice may summon an associate judge of such court. Every judge summoned shall attend and, unless excused by the Chief Justice, shall remain throughout the sessions of the conference and advise as to the needs of his circuit or court and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.

The conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary, and shall submit suggestions to the various courts, in the interest of uniformity and expedition of business.

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

The Attorney General shall, upon request of the Chief Justice, report to such conference on matters relating to the business of the several courts of the United States, with particular reference to cases to which the United States is a party.

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

28 U.S.C.A. §2071 (West 1982)

§2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

28 U.S.C.A. §2072 (West 1982)

§2072. Rules of Civil Procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

REPLY

BRIEF

NO. 84-1839

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RONALD A. SCHIAVONE, GENARO LIGUORI and JOSEPH A. DiCAROLIS,

Petitioners,

vs.

FORTUNE, also known as TIME, INCORPORATED,

Respondent.

On Certiorari to the United States Court of Appeals for the Third Circuit

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Other Authorities Cited

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3 Moore's Federal Practice:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RONALD A. SCHIAVONE, GENARO LIGUORI and JOSEPH A. DiCAROLIS,

Petitioners,

vs.

FORTUNE, also known as TIME, INCORPORATED,

Respondent.

On Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONERS

POINT I

The amendment, correctly naming Fortune as a Division of Time, Inc., should relate back to the filing of the initial complaint.

A. Introduction.

It is common ground between the parties that notice and actual knowledge of the timely filed libel complaint, based upon an article in Fortune Magazine, reached the owner and publisher, Time, Inc. at the very same time, to the split second, that process would have arrived at the Time, Inc. headquarters, had Time, Inc., *eo nomine,* been named in the original Complaint.

It is equally free from dispute that the text of Rule 15(c), which is the core of the dispute, mandates notice ". . . within the period provided by law for commencing the action against him . . ."

The issue is the meaning of this text, when examined against its history and purpose, and when tested by the results of the mutually contradictory, alternate readings, for which the parties contend.

The Respondent's brief seldom quotes the Rule text without hatching in the Respondent's reading, thusly "(i.e., within the limitations period)". But the solution is not advanced by *ipse dixit* repetition.

The true meaning of Rule 15(c) is illuminated by its history and goals and confirmed by the comparative fidelity of the authentic interpretation to the central purpose of all rules of procedure, namely justice on the merits, and only the merits.

The Respondent's brief draws the wrong conclusion from the history of Rule 15(c) and abdicates any effort to reconcile its overliteral reading of Rule 15(c) with the ends of justice on the merits, controlled by Rule 1, and the unifying principle of the entire book of Rules.

B. The Respondent's brief misreads the history of Rule 15(c) to the wrong conclusion.

Both parties have identified the same historical stepping stones which led to the adoption of Rule 15(c).

Between 1958 and 1960, four Social Security cases were lost because the plaintiff-claimant in each case failed to join the incumbent Secretary of the Department of Health, Education and Welfare, naming instead a predecessor

secretary, (*Sandridge* v. *Folson,* 200 F. Supp. 25 (M.D. Tenn. 1959)); the Department itself, (*Hall* v. *Department of Health, Education & Welfare,* 199 F. Supp. 833 (S.D. Tex. 1960)); the United States of America, (*Cunningham* v. *U.S.,* 199 F. Supp. 541 (W.D. Mo. 1959)); and the Federal Security Administration, a non-existant organization by that name, (*Cohn* v. *Federal Security Administration,* 199 F. Supp. 884 (W.D. N.Y. 1961)).

Aroused by these failures of justice on the merits, Harvard Professor Clark Byse campaigned for corrective changes in both the Social Security Act and the Rules. Byse, *Suing The "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform,* 77 Harv. L. Rev. 40, 55-56, n.42 (1963). As applicable to cases against the United States or its agents, Professor Byse favored a change in Rule 21, which was never adopted. As applicable to civil litigation generally, Professor Byse proposed a text which is very similar to Rule 15(c) and which included a requirement of notice to the defendant brought in by amendment ". . . within the period provided by law for bringing the action against him . . ." The Supreme Court Advisory Committee on Civil Rules took up the matter a year later. The Committee's proposed amendment of Rule 15(c) was close to the Byse text. The only change in the notice requirement was to replace "bringing" with "commencing". The Committee version was adopted by the Supreme Court and this became the final text of Rule 15(c).

As to cases against the United States or its agents, the Committee proposed, and now Rule 15(c) provides, that the notice requirement is met by service of process upon the United States Attorney, the Attorney General

or the proper defendant agency, but defines *no time requirement* for such service.

The Respondent derives from this history a clear intention on the part of Professors Byse and Kaplan and by the Advisory Committee to clamp down upon relation back of party amendments unless the party to be brought in has been notified before the statute of limitations has run.

The history proves that such a reading is exactly opposite to the intended result. Of the four District Court cases which triggered the adoption of Rule 15(c), only one incudes a chronology, indentifying the time of service, and thus fixing the time of the first notice to any government officer, and relating that event to the operative 60 day limitations period. That case is *Sandridge* v. *Folsom*, 200 F. Supp. 25 (M.D. Tenn. 1959). There the complaint was filed on the last permissible, *i.e.*, the 60th, day. It is thus certain that the first notice to any government officer *followed* the *expiration* of the limitations period, although within the period allotted by Rule 4 for timely service of process after timely filing of a complaint.

It is clear beyond debate that all concerned with the 1966 Amendment of Rule 15(c) labored to insure against repetition of the outcome of *all* four cases, which inspired the change. This would happen only if the critical notice requirement, ". . . within the period provided by law in commencing the action against them. . .," meant the period for filing of a timely complaint followed by timely service. Otherwise the reform would have miscarried in the *Sandridge* case and, very probably, in the other three cases as well. That the Advisory Committee set out to install a dispensation for relation back exactly opposite the pro-

fessed intention to overcome the four district cases, is the lesson which the Respondent would draw from the text of Rule 15(c). The conclusion is so manifestly unfaithful to the declared purposes of the Advisory Committee that it must be the wrong reading of the Committee's goal.

The Respondent takes comfort from a truncated excerpt from the Advisory Committee's Report. What the Committee actually said, at greater length, is:

> "Relation back is intimately connected with the policy of the statute of limitations. The policy of the statute limiting the time for suit against the Secretary of HEW could not have been offended by allowing relation back in the situations described above [i.e., in the four cases, including *Sandridge*]. For the government was put on notice within the stated period—in the particular instances, by means of the initial delivery of process to a responsible governmental official (see Rule 24(d)(4) and (5)". (Brackets added).

3 Moore's *Federal Practice* §15.01(9), p. 15-10.

The Committee could not have found clearer language to say that Rule 15(c) fits and applies an action commenced within the limitations period, provided that notice is brought home to the correct defendant by service of process within the period thereafter allowed by Rule 4.

These are exactly the facts of the instant case against Time, Inc.

There is not the slightest indication that the Advisory Committee proposed to create a double standard, one for citizens cases against the United States and another for

private litigation. Nor is there any rational public policy which would justify such discrimination.

The only reading of Rule 15(c), which fits the expressed intention and understanding of the Advisory Committee and Professors Byse and Kaplan, is that relation back follows if the correct defendant was notified within the period for timely service after the timely filing of the initial complaint.

That happened here.

C. The over-literal reading of the second sentence of Rule 15(c), for which Time, Inc., contends, would make it inapplicable to the instant case.

If applied across the board, an over-literal reading of Rule 15(c), second sentence, would not serve the purpose of Time, Inc., namely to prevail without having to confront the merits. The second sentence, which features the notice requirement upon which Time, Inc. relies, is confined by its text to "an amendment *changing* the party against whom a claim is asserted . . ." (emphasis added). The correction of misnomer involves a change of name without a change of party. The instant case fits the misnomer category. The libel action was brought against the publisher of Fortune, misnamed Fortune and actually the entity Time, Inc. No "changing" of parties is involved by an amendment identifying Time, Inc. If Rule 15(c), second sentence, is read with absolute literalism, it does not apply to misnomer and its notice requirements, whatever they are decided to mean, are irrelevant to the instant case.

For Time, Inc., overliteralism is a double standard, to be practiced in applying the notice requirement of Rule 15(c)

and overridden in applying the precondition of the very same sentence, *i.e.*, a change of defendant, which literally excludes misnomer cases.

D. The interests of justice on the merits should be made to prevail.

Time, Inc., cannot have it both ways. If the Rule is to be read literally, then it does not apply to misnomer. However, if the interpretation of the Rule is to be gathered from its text, set against its history and purpose, then it applies to misnomer, as well as party substitutions but, in both types of cases, mandates relation back if notice was given within the time allowed by Rule 4 for service of process after the timely filing of a complaint, albeit after the limitations period for commencement of the action has expired.

Consequently, the decisions below were in error, whether Rule 15(c), second sentence, is read literally or whether it is construed to fulfill its manifest purposes, beneficent to the interests of justice on the merits.

Turning to the meritorious considerations bearing on the correct application of the notice requirement of Rule 15(c), the Time, Inc., brief essentially marshalls the arguments of those Courts of Appeal which favor a strictly literal reading. They boil down to convenience and uniformity. If the statute of limitations period governs, without more, Rule 15(c) can be administered by a home computer, once the correct dates are punched in. And the results will be indifferent to local variations in the style and time for service of process, imported into Rule 4. The opposite approach is to read Rule 15(c) according to its purpose and thereby to vindicate justice on the merits whenever notice is brought home to the correct defendant within

the very period allowed by Rule 4 for timely service upon the intially named party.

Under a protocol of procedure, committed by Rule 1 ". . . to secure the just, speedy and inexpensive determination of every action", only that construction of Rule 15(c)~~, which is~~ the more likely to vindicate the substantive merits, is permissible.

The Time, Inc. brief denigrates the construction of Rules to yield justice on the merits as "simplistic" (Rb27-1). Where two avenues of procedure open up and that one, which fulfills both the substantive merits of the case and the expressed grand goals of the Advisory Committee, is readily and plainly evident, simplicity in pronouncing the correct version is a virtue, confirming the choice.

POINT II

Time and Fortune are one and the same in the eyes of F. R. Civ. P. 15; hence, notice to Time need not be within the applicable limitations period.

It is perhaps most telling that while Time agrees "timely filing of the action (which provides constructive notice) is sufficient" notice to a correctly named party, Time dismisses Petitioners' identity-of-interest argument (in three pages of a fifty page brief) as entirely beside the point (Rb42 to Rb44). In short, Time asks the Court to blind itself, as Time purposely did, to the Siamese connection between Time and Fortune, to the undeniable fact that Fortune is merely a trademark—an "artifice"—of Time, to their absolute and total commonality of ownership, control and locus, and finally, to the timely filing of the Complaint and service (*i.e.* "notice") upon Time, Inc.

Time's position that the second notice to a "misnamed defendant", this time using his correct name, must be served sooner than the first notice even when both notices are directed to one and the same party, cannot be squared with any known objective of the Rules of Civil Procedure.

The essence of the Respondent's misunderstanding is found in these words of Time, Inc:

> "Petitioners are not in the same position as plaintiffs who have sued a properly named defendant within the limitations period. If they were, there would be no need for Rule 15(c)."
>
> (Rb23).

In that passage, albeit perhaps unwittingly, Respondent manifests the ineluctable truth of the identity-of-interest exception to Rule 15(c). By suing "FORTUNE" within the applicable statute of limitations and serving notice on Time, Inc's registered agent for service in New Jersey in a timely fashion under F. R. Civ. P. 4(C)(2)(c)(ii), Petitioners *are* in the same position as any other persons who sued Time Incorporated and who therefore need *not* satisfy Rule 15(c).

Where a corporate entity is used in the name of one of its four unmistakably identifiable trademarks (which also happen to be "internal divisions" of Time Incorporated (Rb3, n.**)), and the original process arrives after the statute of limitations has run, Time, Inc. would have it that a new Rule 15(c) must be written to allow the corrective amendment to relate back. Not so where there is a plain identity of interest. In *Jimenez* v. *Toledo*, 604 F.2d 99, 102 (1st Cir. 1979), relied upon by the Respondent, the Court summarized identity-of-interest as a con-

cept which "provides that the *institution* of the action serves as *constructive notice* of the action to the parties *added after the limitations period expired,* when the original and added parties are so closely related in business or other activities that it is fair to presume the added parties learned of the institution of the action shortly after it was commenced . . ." (Emphasis added).

The Court need make no presumption that Time received notice shortly after the action was commenced; that fact is beyond contradiction.

In short, Respondent's attempt to meet the identity-of-interest exception rises no higher than mere repetition of its arguments against unrelated and totally distinct parties. But the inquiry whether the substitution of Time, Inc., in the place of Fortune, effects a change of parties within the intendment of Rule 15(c), cannot be deflected by a constant retreat to the theme that "within the period provided by law for commencing the action against him" means "within the limitations period." (Rb45). To permit Time to disclaim Fortune, as something other and different than itself, is about as sensible as to allow the "Secretary of Health, Education and Welfare" to disavow his relation to the "United States" or to forever bar judicial review of administrative actions because a litigant mistakenly, but timely, sued the "Federal Security Administration" and later sought to correct the agency's name. Notice to the intended party in all of these examples, like notice to the originally-named defendant, need not reach that party within the applicable statute of limitations; it need only be given "timely", under Rule 4.

Those Circuits which subscribe to the Respondent's view follow the same "quick, easy, and safe route" as did

the four District Courts which Professor Byse criticized. Byse, *supra,* at 52. Those Circuits also perceive an obvious defect in the Rules which is in fact, nonexistent. Kaplan, "Continuing Work of the Civil Committee": 1966 Amendments of the Federal Rules of Civil Procedure, 81 *Harv. L. Rev.* 356, 408 (1967). If those Circuits had engaged in the "more arduous, time-consuming, and risky course of independent analysis" (Byse, *supra,* at 52), to, as Professor Kaplan favored, "reach for the purpose of the limitations period"—they would have been satisfied, had the present facts been before them, that timely notice was given to the intended party and that the "incorrect naming of the defendant should have been treated as an amendable error." Kaplan, *supra,* 81 *Harv. L. Rev.* at 408.

POINT III

Rule 15(c) need not be amended to sustain relation back of Petitioners' amended complaints.

In the end, the Respondent's position is that Rule 15(c) was badly put together, by those who were below the task and left cracks through which the instant and all like cases must fall. Moreover, according to Respondent, the opening is so wide, that it cannot be bridged by construction, and must be repaired by crafting a new Rule, which is passed through the rule writing Committees. Another version of the same approach is that it is beyond the Supreme Court's judicial power to read its own rules to mean what they intended and that the Court's only recourse is to exercise its legislative rule making authority, while allowing the instant case to expire.

The argument answers itself. If Chief Judge Feinberg, writing for the Second Circuit Court of Appeals in *Ingram* v. *Kumar*, 585 F.2d 566 (2nd Cir. 1978), *cert. den.* 440 U.S. 940 (1979) could find in Rule 15(c) words which, by a fair reading, match and achieved the plain purpose of the Rule and the Supreme Court, its ultimate author, then the Rule suffices. What is needed is a fair reading of the words, inclined to their history and context.

Courts habitually read Constitutions and statutes, so that the words do not confound their purpose. Given that the Rules of Civil Practice are adopted by the Supreme Court itself, a like approach to Rules cannot be out of bounds.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Third Circuit dismissing Petitioners' complaints should be reversed and the matters remanded for further proceedings.

Respectfully submitted,

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